

1997

The Rights to Future Technologies: Should *Bourne v. Disney* Change the Rules?

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Recommended Citation

Gayley Rosen, *The Rights to Future Technologies: Should *Bourne v. Disney* Change the Rules?*, 24 Fordham Urb. L.J. 617 (1997).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol24/iss3/6>

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RELIGION AND POLITICS: A REPLY TO JUSTICE ANTONIN SCALIA*

*Nadine Strossen***

I. Introduction

I am honored and delighted to speak at the Jewish Theological Seminary ("JTS"). From a personal perspective, I am especially pleased to be here because I am Jewish myself and live right in this neighborhood. On both counts, therefore, I feel quite at home. As a civil libertarian, I always feel especially comfortable in Jewish audiences, because Judaism entails such a strong commitment to human rights.

When Rabbi Visotzky invited me to participate in this lecture series, he gave me a lot of latitude to deal with its broad subject—religion and politics—but he suggested I might well want to respond to the remarks that Supreme Court Justice Antonin Scalia made on this and related subjects when he lectured in this series last month. Indeed, Rabbi Visotzky noted my self-restraint during the question-and-answer session that followed Justice Scalia's lecture, which I attended, since I did not raise any questions or comments then. That was only because I respected the free speech rights of other audience members, and not because I had no comments. To the contrary, I was overflowing with responses to Justice Scalia's remarks, but I knew that I would get my chance to make them tonight.

Justice Scalia spent much of his lecture describing and commenting on the thirteen Establishment Clause cases the Supreme Court

* This piece is an edited transcript of Professor Strossen's oral presentation on "Religion and Politics" at the Jewish Theological Seminary ("JTS") in New York on June 18, 1996. She was responding to Justice Antonin Scalia's presentation at JTS on the same subject on May 21, 1996. Excerpts from both presentations were broadcast on National Public Radio's program "Bridges: A Liberal-Conservative Dialogue," on August 2, 1996. The edits reflect developments subsequent to the oral presentations, including the Supreme Court's two decisions in June, 1997 concerning the First Amendment's religion clauses: *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), and *Agostini v. Felton*, 117 S. Ct. 1997 (1997).

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had decided during his tenure on the Court.¹ The American Civil Liberties Union ("ACLU") had directly represented the parties asserting Establishment Clause claims in half of these cases. I disagree with Justice Scalia's assessment of almost all of those cases, as well as with almost everything else he said.

But before I get to the areas of disagreement, let me start on a positive note by stressing one thing I really liked and admired about Justice Scalia's presentation: his sense of humor. I believe that retaining one's good humor is essential, even when discussing deeply important subjects such as religion and politics; indeed, it is *especially* important in such contexts. This point was made during a recent discussion in one of the ACLU's on-line chat rooms.² There was a competition to come up with other phrases for which our initials could stand. From my perspective, the hands-down winner was, "Aw, C'mon, Lighten Up!"

In that spirit, I would like to describe a political cartoon about the ACLU that came out right before Passover this year, which is germane to the topic of this lecture series. It depicts Moses in front of Mount Sinai bearing the two tablets. As Moses shows them to a man who is pulling a wagon carrying a golden calf on which is emblazoned "ACLU," the man scratches his chin skeptically and comments: "The Ten Recommendations? I guess I can live with that."

Amusing as it is, this cartoon also raises a serious point that is central to the theme of this lecture series. It taps into the widespread misconception that a strong vision of the Establishment Clause³—which the ACLU has consistently defended—is somehow inimical or hostile to religion. This misconception was belied, for example, by the three co-authors of the *Handbook on Religious*

1. *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); *Board of Educ. of Westside Community Sch. (Dist. 66) v. Mergens*, 496 U.S. 226 (1990); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Hernandez v. Commissioner*, 490 U.S. 680 (1989); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Edwards v. Aguillard*, 482 U.S. 578 (1987).

2. The ACLU's on-line forums can be accessed through the ACLU's site on America Online (keyword "ACLU") or on the World Wide Web <<http://www.aclu.org>>.

3. U.S. CONST. amend. I (stating that "Congress shall make no law respecting an establishment of religion . . .").

Liberty,⁴ which the ACLU recently published. These three are an ordained Baptist minister, an ordained Episcopal priest, and someone who had studied at rabbinical school (although he did not become a rabbi). Recognizing that to many their religiosity might seem inconsistent with their strict separationist beliefs, they wrote:

"[T]he three authors of this book believe, with the American Civil Liberties Union, that keeping religion and state separate is not godless but in the best interest of both religion and state."⁵

Robust First Amendment religious freedoms, including those under the Establishment Clause, are especially important to members of religious minorities, including Jews. Rabbi Eric Yoffie of the Union of American Hebrew Congregations recently wrote: "The provision in the U.S. Constitution of church-state separation,⁶ more than any other, has assured Jews religious freedom and social success in this country."⁷

Alas, that centrally important guarantee is now very much under attack. The attacks have been mounted by well-organized radical right-wing groups such as the Christian Coalition, and they have been supported by the rulings of Justice Scalia and some of his Supreme Court colleagues, who share those groups' narrow understanding of the Establishment Clause.

I deliberately eschew the label that is commonly applied to those groups, "the Religious Right," since that implies that it is the religious nature of their beliefs that is somehow objectionable or antithetical to civil liberties, including religious freedom. Any such implication would be completely incorrect for two reasons. First, individuals have fundamental freedoms to hold and assert religious beliefs, and to seek to influence the government to enact policies that are consistent with those beliefs. Whenever those rights are threatened, the ACLU stands up for them.⁸ Second, many religious people and organizations, including those with Christian be-

4. BARRY LYNN ET AL., *THE RIGHT TO RELIGIOUS LIBERTY: THE BASIC ACLU GUIDE TO RELIGIOUS RIGHTS* (1995).

5. *Id.* at Introduction.

6. While the Establishment Clause is commonly paraphrased as guaranteeing "separation of church and state," I prefer to substitute "religion" for "church" in that phrase, in recognition of the fact that a church is the place of worship only for certain religions.

7. Rabbi Eric H. Yoffie, *A Liberal Response*, REFORM JUDAISM, Spring 1993, at 9, 11.

8. To cite one recent example, the ACLU opposed a proposed lobbying "reform" bill that would have curtailed the First Amendment rights of (among others) the Christian Coalition, by requiring it to turn its membership lists over to the federal government; the ACLU accordingly collaborated with the Christian Coalition in

liefs, have supported separation of government and religion,⁹ and other human rights,¹⁰ specifically because such rights are consistent with their religious beliefs. Therefore, it is the anti-civil-liberties aspects of the agenda of the Christian Coalition and other extreme right-wing groups to which I object, not any religious beliefs that may undergird that agenda.

While the Christian Coalition may not represent the majority of Christians,¹¹ it has disproportionately great political strength,¹² which it has wielded to the detriment of civil liberties, including separation of government and religion.¹³ The Christian Coalition's anti-liberties clout was highlighted by the 1996 Republican Convention. The Coalition's Executive Director, Ralph Reed, boasted that 60% of the Convention's delegates were supporters of his or-

working to defeat the bill. See 140 Cong. Rec. S14281, at S14283 (1994) (Lobbying Disclosure Act of 1994, S. 349, 103d Cong., 2d Sess.).

9. *Church Groups Fight Proposal For Amendment On School Prayer*, THE NEWS TRIB., July 23, 1996, at A1 (noting leaders of major religious groups denounced plans to revive organized school prayer through a constitutional amendment, warning it would weaken safeguards provided by the separation of church and state); see also Jim Myers, *Ministers Assail Prayer Proposal*, TULSA WORLD, July 23, 1996, at A1 (stating ministers from several of the country's major denominations denounced as "dangerous" and "radical" a renewed effort in Congress to add a school prayer amendment to the Constitution).

10. Larry Witham, *Effort to Topple Veto Unites Leaders of Society in Prayer; They See Declining Nation, Illegitimate Government in Failure*, WASH. TIMES, Sept. 27, 1996 (noting some religious groups back partial-birth abortion as a woman's choice or a means to health); see also Ira Rifkin, *Some Religious Republicans Lament Harsh Abortion Stance*, PLAIN DEALER, Aug. 15, 1996 (stating religious liberals who support abortion rights have held rallies and news conferences).

11. *The End of Church-State Separation*, WALL ST. J., Oct. 5, 1995, at A15 (noting the Christian Coalition does not speak for all Christians, nor even a majority of Christians); see also *Payback Time*, COURIER-JOURNAL, May 27, 1995, at 14A (stating that the Christian Coalition does not represent even a majority of Christians).

12. Richard Vara, *Religion's Top 10 In 1995: Rabin Death Leads the List*, HOUS. CHRON., Dec. 30, 1995 (noting the continuing political strength of the Christian Coalition with an estimated 1.7 million members); see also Curtis Wilkie, *Christian Right Takes Control of Iowa GOP*, BOSTON GLOBE, Oct. 9, 1995 (noting that a Des Moines School Board candidate had compared the political strength of the Christian Coalition to "a virus that is strong and virulent").

13. *The Peril of Prayer in Public Schools*, STAR-LEDGER (Newark, NJ), Sept. 16, 1996 (stating the Christian Coalition is attempting to have school prayer imposed and it would like to fuse religion and government so that one institution is followed as blindly and without question as the other); *Threat to Our Freedom*, ROCKY MTN. NEWS, June 12, 1995, at 29A (noting that the "Christian Coalition is . . . seeking to amend the Constitution and subvert the First Amendment. . . . The Coalition's Contract with the American family will essentially do away with the separation of church and state, eroding our rights to freedom of and from religion and jeopardizing our freedoms of speech, press, assembly, and our right to petition the government").

ganization.¹⁴ Not surprisingly, then, the Convention toed the Coalition's line on major issues, despite the objections of many Republican elected officials and party leaders, including the party's Presidential nominee, Bob Dole.¹⁵ One striking example concerns separation of government and religion. The Republican platform calls for a constitutional amendment to fundamentally rewrite the Establishment Clause by permitting government-sponsored prayer in the public schools and other public places.¹⁶

The positions and political influence of the radical right were well-documented in a book that the Anti-Defamation League ("ADL") published in 1994, entitled *The Religious Right: The Assault on Tolerance & Pluralism in America*.¹⁷ It is a marvelous but frightening documentation of the current right-wing threat to religious liberty in general, and to the religious liberty of Jews in particular.

Just as a strictly-enforced Establishment Clause is especially helpful to religious minorities, an unenforced or under-enforced Establishment Clause is especially threatening to them. At best, lowering Thomas Jefferson's proverbial "wall" between government and religion¹⁸ has the unintended effect of disadvantaging religious minorities, including Jews.¹⁹ At worst, it is expressly in-

14. John Harwood, *Campaign '96: Conservative Christians Prove More Powerful Than Dole in Shaping the GOP Abortion Plank*, WALL ST. J., Aug. 7, 1996, at A14 (noting religious conservatives account for nearly 60% of the delegates to the 1996 Republican convention).

15. U.S. NEWswire, Sept. 25, 1996, at 10 (stating that the Religious Right's plank on abortion was included in the Republican Platform despite the objections of the party's Presidential nominee; while Dole did not oppose abortion in cases of rape, incest or endangerment to the mother's life, the platform called for a constitutional amendment completely prohibiting abortion in all cases).

16. *School Prayer-Again House Republicans are Tinkering Needlessly With The First Amendment*, L.A. TIMES, July 31, 1996, at N10 (noting a familiar election-year issue has resurfaced on Capitol Hill, where the Republican majority leader is calling for the adoption of a constitutional amendment that explicitly authorizes "student-sponsored prayer" in public school); *School Prayer Revisited*, CHRISTIAN SCIENCE MONITOR, July 25, 1996 (stating that the school-prayer measure has been given a bit of fresh momentum for the coming year election).

17. DAVID CANTOR, *THE RELIGIOUS RIGHT: THE ASSAULT ON TOLERANCE & PLURALISM IN AMERICA* (1994).

18. See *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (quoting reply from Thomas Jefferson to an address by a committee of the Danbury Baptist Association (January 1, 1802)).

19. See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring in judgment):

[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates

tended to do so, reflecting a current of anti-Semitism. That theme was at least an undercurrent in the following declaration by Pat Robertson, President of the Christian Coalition:

The Constitution of the United States is a marvelous document for self-government by Christian people. But the minute you turn the document into the hands of non-Christian people and atheist people, they can use it to destroy the very foundation of our society.²⁰

That statement is particularly shocking, given that Pat Robertson is not only a minister, but also a lawyer. Having received his legal education at Yale Law School,²¹ he should have learned about the secular nature of our Constitution and the government it created.²²

There are connections among the radical right's attacks on civil liberties, the anti-Semitism that, as the ADL has documented, underlies many of these attacks,²³ and also its constant demonizing of the ACLU, which it regularly targets as the "anti-Christ" in fundraising letters and other communications.²⁴ For example, in a 1990 *Los Angeles Times* interview, Billy McCormack, a director of the Christian Coalition, said the following: "The Jewish element in the ACLU . . . is trying to drive Christianity out of the public place Because the ACLU is made up of a tremendous amount of Jewish attorneys."²⁵

the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish.

20. CANTOR, *supra* note 17, at 6.

21. Pat Robertson graduated from Yale Law School in 1955.

22. See Isaac Kramnick, *Jefferson vs. the Religious Right*, N.Y. TIMES, Aug. 29, 1994, at A15 (noting that Jefferson was a strong adherent of church/state separation who wrote that "[t]he legitimate powers of government extend to such [religious] acts only as are injurious to others, but it does no injury for my neighbor to say there are 20 Gods or no God. It neither picks my pockets nor breaks my leg.").

23. CANTOR, *supra* note 17, at 5 (citing, taped interview with Billy McCormack, director of the Christian Coalition (Nov. 14, 1990)); *id.* at 42.

24. Referring back to the on-line chat I described earlier, about other phrases for which "ACLU" could stand, I have seen some vicious attacks on our organization that say those initials should stand for "Anti-Christian Liberties Union." See, e.g., Edith Stanley, *American Album: Alabama Judge Goes to Court in Religious Battle*, L.A. TIMES, Jan. 11, 1996 (stating that Rev. Mickey Kirkland, pastor of the Lighthouse Baptist Church in Montgomery shouted out "The American Civil Liberties Union should change their name to the Anti-Christian Lawyers Union"); Cody Lows, *ACLU, Too, Has Taken to Rabble-Rousing to Raise Funds*, ROANOKE TIMES & WORLD NEWS, Oct. 1, 1995 (noting the "religious right" has taken a hard rap for being intolerant and extremist; for example, in its fund-raising letters, the American Civil Liberties Union is renamed the Anti-Christian Liberties Union).

25. CANTOR, *supra* note 17, at 5 (citing, Taped interview with Billy McCormack, Director of the Christian Coalition (Nov. 14, 1990)).

I hasten to underscore that I am certainly not making charges of anti-Semitism against all people who hold narrow views about the First Amendment's religion clauses. But I am accusing them of at least insufficient consciousness of the adverse impact that such narrow views have on Jews and other religious minorities. For example, during his JTS talk, Justice Scalia referred to some constitutional rights as a "luxury"²⁶ that we cannot afford. In that context, he was referring specifically to constitutional rights of people who are accused or suspected of crime, but he has also shown a similarly dismissive attitude toward the First Amendment's Free Exercise Clause,²⁷ which guarantees freedom of worship. In his majority opinion in *Employment Division, Department of Human Resources v. Smith*,²⁸ which radically truncated the scope of that clause, Justice Scalia dismissed the important constitutional right at stake in a manner that was almost cavalier, and he overlooked how particularly significant that right is to religious minorities.²⁹ In her separate opinion, Justice Sandra Day O'Connor decried *Smith's* abandonment of the Court's traditionally strict enforcement of the Free Exercise Clause precisely because of the adverse impact on religious minorities: "The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish."³⁰

I would now like to turn to three major topics that are implicated both by the theme of this lecture series and by Justice Scalia's talk: constitutional interpretation regarding individual liberty in general, and constitutional interpretation specifically regarding the two religion clauses of the First Amendment—the Establishment Clause and the Free Exercise Clause.

II. Constitutional Interpretation

Justice Scalia proudly described himself as a "textualist" and said "strict constructionists give textualists a bad name." With all due respect, though, I think Justice Scalia himself gives textualists a bad name. He celebrated "textualism" as supposedly being faithful

26. Justice Antonin Scalia, Address at the Jewish Theological Seminary (May 21, 1996).

27. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

28. 494 U.S. 872 (1990).

29. See discussion of this opinion, *infra* text accompanying notes 165-73.

30. *Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment).

either to the Constitution's plain language or, where the language is not clear, to history and tradition. He asserted that this was the most objective, predictable approach to constitutional interpretation.

However, Justice Scalia's own statements showed that textualism does not in fact live up to any of these claims. The difficult, controversial issues of constitutional law are not, by definition, squarely resolved by the Constitution's text. To the contrary, the text itself demonstrates that the framers intended certain provisions to be open-ended, and therefore to be interpreted in light of changing conditions. As the great Chief Justice John Marshall famously declared, in support of an expansive interpretation of a constitutional provision early in our history: "We must never forget it is a *Constitution* we are expounding . . . intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."³¹

During his lecture, Justice Scalia showed a selective, subjective approach to textualism. For example, he was willing to deviate from the Fourth Amendment's strict warrant and probable cause requirements, commenting: "The needs of our society have not now or ever been able to tolerate such an indulgence." As previously noted, this is similar to Justice Scalia's view of the First Amendment's Free Exercise Clause as a dispensable "luxury." Apparently, then, according to Scalian textualism, only *some* constitutional provisions should be enforced strictly as written.

In this vein, it was ironic that Justice Scalia's lecture warned of the danger of "morphing" the Constitution on the ground that this could lead to the erosion of constitutional rights. Justice Scalia maintained that judicial "morphing" of the Constitution by recognizing rights it does not expressly enumerate inevitably would lead to judicial "morphing" in the opposite direction: *not* recognizing rights it *does* expressly enumerate. In fact, though, Justice Scalia and other members of the Court's so-called "conservative" wing have often, unblushingly, ignored plain constitutional language to do just that.

For example, Justice Scalia recently authored a majority opinion that in effect created an exception to the Bill of Rights for public school students,³² despite the absence of any constitutional language suggesting that rights are limited to the "free adults"³³ with

31. *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

32. *Vernonia School Dist. v. Acton*, 115 S. Ct. 2386 (1995).

33. *Id.* at 2392.

whom Justice Scalia's opinion contrasted the young people who are studying in our nation's public schools. Conservative Justices also have read into the First Amendment's Free Speech Clause exceptions to constitutionally protected speech, which are not even suggested in the text, let alone clearly delineated there. That is true, for example, for the sexually-oriented expression that the Court has banished beyond the First Amendment pale under the rubric of "obscenity."³⁴ As another example, conservative Justices have read an unwritten limitation into the open-ended equality guarantee in the Fourteenth Amendment's Equal Protection Clause, deeming it to treat gender-based discrimination and other types of discrimination as less violative than racial discrimination.³⁵

It is completely consistent with the plain language and design of the Constitution to conclude that it tolerates—indeed, commands—what Justice Scalia would apparently consider “one-way morphing”: *i.e.*, to authorize judicial enforcement of rights it does not expressly enumerate, but not to authorize judicial non-enforcement of rights it does expressly enumerate. There is no symmetry here, for a very important reason that Justice Scalia overlooked: our fundamental rights are not limited to those set out in the Constitution. Our government was founded on a natural rights philosophy, eloquently articulated in the Declaration of Independence. Our founders shared the Enlightenment view that human beings are entitled to certain fundamental rights merely by virtue of being human, and that no government may legitimately abridge those inherent rights. To the contrary, one of the most important functions of government, in their view, is to protect those rights.³⁶

This philosophy of inherent human rights pervades all of our government's constitutive documents: not only the Declaration of Independence, but also the Constitution and the Bill of Rights. For

34. *Miller v. California*, 418 U.S. 915 (1974); *Paris Adult Theatre et al. v. Slaton*, 418 U.S. 939 (1974).

35. *United States v. Virginia*, 116 S. Ct. 2264, 2295 (1996) (Scalia, J., dissenting); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (reaffirming that “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives”).

36. Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 *How. L.J.* 145, 219-20 (1984) (stating “[the] basic expectation of the founders had been that the rights of man are protected under the Constitution, and it is a truism that universal rights must necessarily be our own.”); John Hasnas, *From Cannibalism to Caesareans: Two Conceptions of Fundamental Rights*, 89 *Nw. U. L. Rev.* 900, 912 (1995) (explaining that our founders shared classical conception of inherent fundamental rights which protect individuals' choices from government interference).

example, the Constitution's Preamble recites as one of the purposes of the newly-formed government structure "to *secure* the blessings of Liberty."³⁷ Significantly, it does not refer to "granting" liberty, but rather to securing the liberty to which individuals were already entitled, wholly independent of the Constitution or any other charter of government.

Of course, proponents of the Bill of Rights advocated an explicit enumeration of certain fundamental rights to be protected from government infringement.³⁸ Moreover, even opponents of amending the Constitution to add the Bill of Rights did not disagree with the natural rights philosophy; to the contrary, they opposed adding the Bill of Rights precisely *because of* that philosophy. Consistent with that philosophy, they believed that an express Bill of Rights was at best unnecessary and at worst dangerous. It was unnecessary because the Constitution did not—and, indeed, *could* not—vest the new government with power to violate inherent individual rights. Worse yet, they considered an express Bill of Rights to be at least potentially dangerous, because the enumeration of certain rights could create an implication that no other fundamental rights were secure against government infringement.³⁹ Specifically to counter any such "negative pregnant," the Ninth Amendment was included in the Bill of Rights, stating: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁴⁰

Consistent with the plain language of the Ninth Amendment and the underlying constitutional history, every Justice on the current Court and in modern history has agreed that the Constitution implicitly protects *some* unenumerated rights;⁴¹ the Justices simply

37. U.S. CONST. preamble (emphasis added).

38. Stephen Macedo, *Originalism and the Inescapability of Politics*, 84 Nw. U. L. REV. 1203, 1208 (1990) (noting that the Anti-Federalists insisted on an explicit enumeration of rights in the Constitution to "ensure the preservation of popular liberty").

39. Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1226 (1990) (stating that the "[F]ederalists responded that the inclusion of specific reservations of particular rights, as contemplated by the proposed bill of rights, was not merely unnecessary, but positively dangerous. A bill of rights would reverse the Constitution's premise that all not granted was reserved; instead, the government would hold all power except what was prohibited in the bill of rights").

40. U.S. CONST. amend. IX.

41. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 869 (1992) (O'Connor, Kennedy, Souter, JJ.) (recognizing "the constitutional liberty of the woman to have some freedom to terminate her pregnancy"); *id.* at 912 (Stevens, J., concurring/dissenting) (finding that "[t]he Constitution would be equally offended by an absolute

disagree among themselves as to *which* such rights it protects. Justice Scalia himself has recognized the existence of implied fundamental rights,⁴² even in his JTS lecture. He said that when the Constitution's text is unclear, the benchmark for protected rights should be "what American society has traditionally accepted." But he was also willing to depart selectively from this asserted benchmark (just as he was willing to depart selectively from strict textualism).

The first question that this assertion by Justice Scalia triggered in my mind was actually asked by someone else in the audience at his lecture: What about such time-honored American traditions as outlawing interracial marriage, mandating segregated schools, and imposing sectarian prayers in public schools? Justice Scalia's answer to that question was disturbing in two respects. First, he answered only regarding interracial marriage. Therefore, maybe he would find, for example, that sectarian public school prayers are justified by tradition; indeed, his answer to another audience question indicated that to be the case, as I will discuss later.

Second, Justice Scalia said that anti-miscegenation laws violated the text of the Equal Protection Clause. But that is certainly not

requirement that all women undergo abortions as by an absolute prohibition on abortions"); *Dallas v. Stanglin*, 490 U.S. 19, 24 (1989) (Rehnquist, J.) (finding a right of freedom of association); *id.* at 28 (Stevens and Blackmun, JJ., concurring) (finding a right of association); *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) (noting, in a 7-0 opinion, that the "Constitution guarantees freedom of association . . . as an indispensable means of preserving other individual liberties"); *Moore v. East Cleveland*, 431 U.S. 494 (1977) (plurality opinion) (upholding the constitutional right to structure family living arrangements); *Eisenstadt v. Baird*, 405 U.S. 438, 463 (White, J. concurring) (finding a right to use contraceptives); *Edwards v. California*, 314 U.S. 160 (1941) (holding, without dissent, that the Constitution implicitly protects a fundamental right to interstate travel); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (reaffirming unanimously Meyer's holding of the right of parents to determine their children's upbringing); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding, without dissent, that parents have a fundamental right to raise their own children).

42. *Morse v. Republican Party of Virginia*, 116 S. Ct. 1186, 1218 (1996) (Scalia, J., dissenting) (quoting *Broadrick v. Oklahoma*, stating that the Supreme Court must act whenever "rights of association [are] ensnared in statutes which, by their broad sweep, might result in burdening innocent associations." 413 U.S. 601, 612 (1973)); *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550 (1987) (Scalia, J., concurring) (agreeing that a California statute requiring California Rotary Clubs to admit women did not violate members' rights of association); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (holding that the "right-to-interstate travel" is not impinged by anti-abortion protesters, whose actions limited respondents' intrastate travel); *Turner v. Safley*, 482 U.S. 78 (1987) (joining the Court's holding that inmates had a constitutionally protected right to marry).

obvious from the plain language of the clause itself,⁴³ or from its history. Nor does the plain language⁴⁴ or history of the Equal Protection Clause clearly outlaw segregated schools. Even the Court's landmark decision invalidating such schools, *Brown v. Board of Education*,⁴⁵ itself recognized this.⁴⁶ Indeed, Justice Scalia's usual ideological ally, Chief Justice Rehnquist, a law clerk to Justice Jackson while the Court was considering *Brown*, notoriously urged Jackson to reject *Brown*'s challenge to racially segregated public schools on this basis.⁴⁷

Just as Justice Scalia selectively sanctions the Court's departure from tradition to uphold rights that are not clearly protected in the Constitution's text, he also has approved the Court's departure

43. One could plausibly argue that anti-miscegenation laws do not violate the Equal Protection Clause because they apply equally to any affected races; for example, whites are no more free to marry blacks than blacks are to marry whites. Indeed, courts rejecting constitutional challenges to these laws prior to *Loving v. Virginia*, 388 U.S. 1 (1967), had accepted this argument. See *Pace v. Alabama*, 106 U.S. 583 (1888) (finding no discrimination against any race in the statute because "[w]hatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.").

If Justice Scalia rejects the reasoning of *Pace*, that should bode well for his analysis of another type of marriage ban that might eventually trigger Supreme Court review: the prohibition on same-sex marriages. If the Equal Protection Clause constrains any ban on marriages between members of two races, even though the ban applies equally to members of both races, then it should also constrain any ban on marriages between members of the same gender, even though the ban applies equally to members of both genders (i.e., both males and females are prohibited from marrying someone of the same gender). See Erik J. Toulon, *Call The Caterer: Hawaii To Host First Same-Sex Marriage*, 3 S. CAL. REV. L. & WOMEN'S STUD. 109, 133 (1993). Toulon notes that in *Loving*, the Court held that prohibitions on interracial marriage denied equal protection because such prohibitions discriminated by allowing a white man to marry a white woman while at the same time preventing a black man from marrying a white woman. *Id.* Toulon points out that this is the same analysis employed by the Supreme Court of Hawaii within the context of a ban on same-sex marriages in *Baehr v. Lewin*, 852 P.2d 44 (1993) (i.e., the court found that Hawaii's ban on same-sex marriages denied equal protection because the state conditions access to marriage on the basis of sex, allowing a man to marry a woman while at the same time preventing a woman from marrying a woman). Toulon, *supra*.

44. See U.S. CONST. amend. XIV, § 1 (stating that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

45. 347 U.S. 483 (1954).

46. *Id.* at 489-90.

47. David J. Garrow, *The Rehnquist Reins*, N.Y. TIMES, Oct. 6, 1996, at 65 (noting that a "controversy [arose] when a Rehnquist memorandum arguing against any Supreme Court voiding of segregated schools and for a continued endorsement of the old doctrine of separate but equal was discovered in Jackson's file on *Brown v. Board of Educ.* Rehnquist unpersuasively insisted—as he would again during his 1986 confirmation hearings for Chief Justice—that the memo represented an articulation of Jackson's views rather than his own.").

from tradition to deny constitutional rights—specifically in the context of religious liberty. As I explain more fully below,⁴⁸ Justice Scalia authored a 1990 decision that not only jettisoned the Court's modern precedents enforcing the First Amendment's Free Exercise Clause; moreover, it did so without any consideration of—and, indeed, in defiance of—the historical underpinnings of that Clause.

In short, Justice Scalia does not in fact demand strict adherence to tradition in answering questions not clearly resolved by the Constitution's text. Accordingly, his vaunted tradition-based approach to constitutional interpretation lacks the chief advantages that he ascribes to it: predictability, objectivity, and constraining judicial discretion.

A tradition-centered constitutional interpretation could not be justified even if it were consistently invoked and therefore did constrain judicial discretion. Contrary to Justice Scalia's deference to tradition, the Supreme Court has long recognized that "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."⁴⁹ Moreover, there is an even more fundamental problem with the notion of limiting constitutional freedoms to those encompassed by Justice Scalia's formulation, "what American society has traditionally accepted": it is a complete reversal of the concept of fundamental rights underlying our governmental system. Our government's founders wisely recognized the potential "tyranny of the majority,"⁵⁰ in James Madison's famous phrase. Therefore, the government they created was not a pure democracy. To be sure, most public policy decisions are committed to the democratically elected, majoritarian legislative and executive branches of government. However, as the Constitution's framers recognized, there are some rights that are so fundamental that no majority, no matter how large, may deny them to any minority, no matter how small or unpopular.

This constitutional philosophy was most eloquently stated in the Supreme Court's landmark 1943 opinion in *West Virginia Board of Education v. Barnette*.⁵¹ Significantly, for present purposes, *Barnette* was a case involving religious liberty—specifically, the reli-

48. See *infra* part IV.

49. *Walz v. Tax Commission of New York*, 397 U.S. 664, 678 (1970).

50. Clarence Page, *Bork Shows His Grouchy Side, Again*, CHI. TRIB., Oct. 6, 1996, at 23 (noting that after the framers of the Constitution put majority rule into place, they went back and shored up minority rights in the Bill of Rights precisely to guard against what James Madison called "the tyranny of the majority").

51. 319 U.S. 624 (1943).

gious freedom of Jehovah's Witnesses, who believed that saluting the American flag violated the First Commandment's bar on idolatry. In striking down mandatory flag salute laws as violating the rights of the members of this minority faith, the Court ringingly affirmed not only freedom of belief and conscience; it also set out core precepts regarding all fundamental rights:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.⁵²

In his JTS lecture, Justice Scalia praised the common law approach of building on tradition, and said he wanted to emulate it for constitutional law. But even the arch-apostle of common-law judging, Oliver Wendell Holmes, himself denounced the type of rigid adherence to tradition that Justice Scalia espouses. Holmes declared, "It is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."⁵³

Along with Holmes, other respected conservative Justices have rejected Justice Scalia's rigid view that the Bill of Rights is "a static document," to quote another phrase Justice Scalia used during his JTS lecture. One prominent example is Justice John Marshall Harlan, one of the most respected conservative jurists in modern history.⁵⁴ Yet, despite his deep judicial conservatism, Justice Harlan was the first exponent of an expansive interpretation of the Fourteenth Amendment's Due Process Clause as containing an implicit guarantee of personal privacy and autonomy in matters of sexuality and reproduction. Accordingly, in a 1961 dissent, Justice Harlan became the first Supreme Court Justice willing to strike down as unconstitutional a state law restricting contraception.⁵⁵

52. *Id.* at 638.

53. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1896-97).

54. See generally *Centennial Conference in Honor of Justice John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 1 (1991).

55. *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

Not until four years later did a majority of Justices reach that conclusion in the landmark case of *Griswold v. Connecticut*.⁵⁶ The unenumerated right of reproductive autonomy, which the conservative Justice Harlan first articulated, was of course the foundation for the Court's historic ruling invalidating restrictions on abortion in *Roe v. Wade*,⁵⁷ a decision that Justice Scalia has strongly criticized and sought to overrule.⁵⁸

In contrast with Justice Scalia's "static" concept of personal liberty, Justice Harlan enforced an evolving concept. He wrote:

Due process has not been reduced to any formula [T]hrough the course of this Court's decisions [due process] has represented the balance which our Nation, built upon . . . respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance . . . is . . . struck by . . . having regard to . . . the traditions from which [this country] developed as well as the traditions from which it broke. *That tradition is a living thing* . . . [T]he full scope of the liberty guaranteed by the Due Process Clause . . . is a rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints⁵⁹

As this passage makes clear, Justice Scalia's rigid, narrow notion of the role of tradition in constitutional interpretation is very different from the more flexible, evolving notion of tradition that has been enforced by other, leading conservative Justices.

I would now like to turn from interpretation of the Constitution in general to interpretation of the two specific constitutional provisions regarding religious liberty. Commonly called the "Establishment Clause" and the "Free Exercise Clause," these two provisions appear in the First Amendment and read as follows: "Congress

56. 381 U.S. 479 (1965).

57. 410 U.S. 113 (1973).

58. See *Planned Parenthood v. Casey*, 505 U.S. 833, 979, 1002 (1992) (Scalia, J., dissenting). In *Casey*, Scalia asserted that the "[s]tates may, if they wish, permit abortion-on-demand, but the Constitution does not require them to do so." *Id.* Scalia went on to end his dissent by stating that "[w]e should get out of this area [abortion], where we have no right to be, and where we do neither ourselves nor the country any good by remaining." *Id.* Scalia noted that his "views on this matter [were] unchanged from those [he] set forth in [his] separate opinions" in both *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (Scalia, J., concurring in part and concurring in judgment) and *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (Scalia, J., concurring).

59. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (emphasis added).

shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁶⁰

III. Establishment Clause

A. The Myth That the Courts Have Driven Religion from the Public Square

As I explained earlier, the Establishment Clause is now facing a very strong attack from the extreme right wing. The Christian Coalition and its many Congressional allies have declared it an important goal to enact a constitutional amendment that would carve out an exception to the Establishment Clause to permit government-sponsored prayer in public schools and other public places.⁶¹ Proponents of such an amendment, which is endorsed by the Republican Party Platform, have misleadingly labeled it the "religious equality" amendment or the "religious liberty" amendment.⁶²

Those inaccurate labels reflect one of the many myths and misconceptions that abound in the ongoing Establishment Clause debate: that students may not now pray in public schools, or—worse yet—that religion has been purged from the public schools altogether by the Establishment Clause and the Supreme Court's decisions enforcing it.⁶³ When I recently debated Pat Robertson about the appropriate role of religion in public schools, he repeated this Big Lie over and over.⁶⁴ For example, he decried "the judicial dis-

60. U.S. CONST. amend. I.

61. Cody Lowe, *Goodlatte For Statute On Prayer Amendment Moving Slowly*, ROANOKE TIMES & WORLD NEWS, July 29, 1996, at C1 (stating that the Christian Coalition and some other conservative Christian organizations continue to support a constitutional amendment related to prayer in public schools); John M. Swomley, *Watch on the Right: Pat Robertson's Contract on America*, THE HUMANIST, July 1, 1995, at 35 (noting that one Christian Coalition agenda point is called "a religious equality amendment" which if adopted, would change the United States from a secular to a religious nation, nullifying the First Amendment's Establishment Clause).

62. *Amendments Threaten Right to Religious Freedom*, THE BUFFALO NEWS, July 14, 1996, at 10F (stating that "two constitutional amendments have been introduced in the 104th Congress that would virtually repeal the Establishment Clause" and that "[t]hese initiatives have been dubbed by their sponsors as the Religious Liberty Amendment and the Religious Equality Amendment."); R. Upton Nelson, *Freedom from Religion*, BANGOR DAILY NEWS, Aug. 3, 1995 (LEXIS, News Library, Arcnws file) (stating that "[a] 'Religious Equality Amendment' is being drafted to be introduced in the U.S. Congress. Under the guise of protecting religious speech, this proposed amendment would essentially gut the Establishment Clause of the First Amendment.").

63. See, e.g., M.G. "Pat" Robertson, *Religion in the Classroom*, 4 WM. & MARY BILL RTS. J. 595, 598 (1995).

64. Nadine Strossen, *How Much God in the Schools? A Discussion of Religion's Role in the Classroom*, 4 WM. & MARY BILL RTS. J. 607 (1995).

tortions which have forbidden little children to pray or read the Bible in school.”⁶⁵ He also charged that the Court and civil libertarians have “misuse[d] the Constitution to exclude religion from the schools and the public square.”⁶⁶ Correspondingly, he declared that prayer should be “returned” to the public schools.⁶⁷

Ironically, Mr. Robertson gave a list of situations in which students’ religious freedom was violated, he said, because of the schools’ distorted view of the Supreme Court’s rulings.⁶⁸ He contended that the schools have an exaggerated sense of what the Court has said the Establishment Clause requires, and hence they prohibit the kind of individual, voluntary, non-school-endorsed religious expression that is both protected by the Free Speech Clause and not prohibited by the Establishment Clause.⁶⁹ Asserting that “these examples have become the norm,”⁷⁰ he accused the schools of engaging in a “religious cleansing that they believe has been mandated by the courts.”⁷¹ But any such distorted view is fueled by the very kind of mischaracterization in which Mr. Robertson himself engaged. If schools do in fact believe that the courts have mandated “religious cleansing,” this may well be because critics such as Mr. Robertson himself have told them so.

These assertions, though, are completely false. Consistent with the Establishment Clause’s guiding principle of government neutrality toward religion,⁷² the Supreme Court recognizes that individual students, as well as voluntarily constituted student groups,⁷³ are free to pray in school, subject only to the same constraints that apply to all student expression.⁷⁴ In short, they must not disrupt the education of other students.⁷⁵ For example, while students may

65. Robertson, *supra* note 63, at 602.

66. *Id.* at 598.

67. *Id.* at 606.

68. *Id.* at 603.

69. *Id.*

70. *Id.*

71. Robertson, *supra* note 63, at 604.

72. See *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

73. See *Board of Educ. v. Mergens*, 496 U.S. 226 (1990).

74. *Id.* at 247-53.

75. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 507-14 (1969) (holding that students’ wearing of arm bands in protest of the Vietnam War was not disruptive and was within the protection of the First and Fourteenth Amendments); see also *id.* at 511 (stating that “the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and

not pray at the top of their lungs in the middle of class, they may pray silently.

Moreover, the Supreme Court has expressly upheld students' rights to form religious clubs that meet in the public schools to engage in group prayer, Bible study, and other religious activities, so long as the school permits other student groups to meet on a non-discriminatory basis.⁷⁶ Furthermore, far from religion having been purged from the classroom, the Supreme Court has repeatedly held that it is completely constitutional and appropriate for schools to teach about religion, and its important role in such fields as history, art, and music, so long as it is discussed in a non-indoctrinating manner.⁷⁷ In short, schools may *teach* about religion; they simply may not *preach* religion. In the Supreme Court's felicitous phrase, "religious beliefs and . . . expression are too precious to be either proscribed or prescribed by the State."⁷⁸

The only type of prayer that the Court has banned from the public schools is school-sponsored prayer.⁷⁹ In the graduation context, for example, students, parents, and/or religious leaders remain free to organize their own baccalaureate services, which may include organized group prayers, but they may not include prayers in the public schools' own ceremonies.

substantial interference with schoolwork or discipline, is not constitutionally permissible").

76. *Mergens*, 496 U.S. at 246.

77. See *Edwards*, 482 U.S. at 578; *Wallace*, 472 U.S. at 38; *Stone*, 449 U.S. at 42 (holding that the posting of the Ten Commandments served absolutely no educational function, such as where they "are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like"); *Epperson*, 393 U.S. at 97; *Schempp*, 374 U.S. at 225 (noting that "it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment."); *Engel*, 370 U.S. at 421; see also *Strossen*, *supra* note 64, at 618:

[Schools] may not disfavor religion . . . for example, by discriminatorily omitting its role in such fields as . . . to cite something very dear to my own heart, civil rights. Religion has played a critical role in historic human rights struggles throughout our history, including the abolition of slavery and racial apartheid. Eliminating discussion of and information about the critically important role of religion in our society is therefore not neutral, and hence violates the Establishment Clause.

78. *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

79. See *id.* *passim*; *Engel*, 370 U.S. at 429-30; accord *Mergens*, 496 U.S. at 253 (holding that student prayer that was not school-sponsored did not violate the Establishment Clause).

B. The Myth That Maintaining a Strict Separation Between Government and Religion Reflects Hostility Toward Religion

The widespread misconceptions about what the Establishment Clause requires and how the Supreme Court has enforced that clause lead to another dangerous distortion in the debates on this issue: the mistaken view that support for a strict separation between government and religion evinces hostility toward religion.⁸⁰ To the contrary, maintaining government neutrality toward religion is at least as important for preserving a sacred, holy concept of religion as it is for preserving a secular state. Therefore, some of the staunchest separationists, from our founders⁸¹ on, have been some of our most religious citizens. Likewise, some of the most religiously devout Supreme Court Justices have been among the Court's staunchest guardians of a strict separation between religion and government.⁸²

In a 1989 decision in which the Court upheld an Establishment Clause challenge to a prominent religious display in a government building,⁸³ Justice Blackmun (who has publicly acknowledged his Christian faith)⁸⁴ forcefully objected to the dissent's view that this ruling somehow evinced hostility toward religion.⁸⁵ Responding to this argument in the dissent, which Justice Kennedy authored and in which Justice Scalia joined, Justice Blackmun wrote:

Although Justice Kennedy repeatedly accuses the Court of harboring a "latent hostility" or "callous indifference" toward religion, nothing could be further from the truth, and the

80. See generally Robertson, *supra* note 63. For a recent example, see Mary Ann Glendon, *Religious Freedom and Common Sense*, N.Y. TIMES, June 30, 1997 at A11 (describing Supreme Court opinions enforcing the Establishment Clause as reflecting an "ill-disguised hostility towards religion").

81. See MARK D. HOWE, *THE GARDEN AND THE WILDERNESS* 6 (1965) (noting Roger Williams's view that "worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained").

82. See Nina Totenberg, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 33, 37 (1990) ("Justice Brennan is a religious man, a devout Catholic who attends mass every week. Yet, . . . he is the author of opinions erecting a high wall of separation between church and state, including decisions banning parochial school aid . . .").

83. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989).

84. See, e.g., Aaron Epstein, *Blackmun Remembered as Abortion Rights Champion*, THE NEW ORLEANS TIMES-PICAYUNE, April 10, 1994, at A18 (noting that Justice Blackmun is a devout Methodist).

85. *Id.* at 655 ("[Blackmun's] view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents, and I dissent from this holding.") (Kennedy, J., dissenting).

accusations are as offensive as they are absurd. Justice Kennedy apparently has misperceived a respect for religious pluralism, a respect commanded by the Constitution, as hostility or indifference to religion. No misperception could be more antithetical to the values embodied in the Establishment Clause.⁸⁶

As the Supreme Court has repeatedly stated: "A union of government and religion tends to destroy government and to degrade religion."⁸⁷ It destroys government because it leads to division along religious lines—the sort of conflicts that have historically led to brutal wars and are still tearing apart many countries, including the former Balkans.⁸⁸ And a union between government and religion degrades religion by watering it down or homogenizing it as a precondition for government approval.⁸⁹ In the words of the First Amendment's author, James Madison: "Religion flourishes in greater purity, without than with the aid of Gov[ernmen]t."⁹⁰

We in the United States have one of the most religiously vibrant communities in the world.⁹¹ Those who have studied religion in America have consistently concluded that religion is so strong here precisely because of our Establishment Clause. For example, back in the 1830s, Alexis de Tocqueville observed that religion was the strongest of all American institutions, and wrote that "all thought that the main reason for the quiet sway of religion over their country was the complete separation of church and state."⁹² To this day,

86. *Id.* at 610.

87. *Engel v. Vitale*, 370 U.S. 421, 431 (1962); see also *Lee v. Weisman*, 505 U.S. 577, 606 n.8 (1992) (Blackmun, J., concurring) (quoting *Engel*, 370 U.S. at 431).

88. See *Engel*, 370 U.S. at 429 (stating that "[the constitutional framers] knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval . . .").

89. See *Weisman*, 505 U.S. at 589-90.

The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference.

Id.

90. Letter from James Madison to Edward Livingston (July 10, 1822), in 9 THE WRITINGS OF JAMES MADISON 1819-1836, at 98, 103 (Gaillard Hunt ed., 1910). Accord, JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in 8 THE PAPERS OF JAMES MADISON 1784-1786, at 295, 301 (Rutland, et al. eds., 1973).

91. Barbara Bedzek, *Religious Outlaws: Narrative of Legality and the Politics of Citizen Interpretation*, 62 TENN. L. REV. 899, 958 n.240 (1995).

92. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 295 (J.P. Mayer ed. & George Lawrence trans., 1969), quoted in *Marsh v. Chambers*, 463 U.S. 783, 822 (1983) (Brennan, J., dissenting).

the United States has one of the highest percentages of regular attendance at religious services in the world—even higher than that of countries with official established religions.⁹³

Just as religion flourishes when it is separate from government, the opposite is also true. Religion is threatened by government involvement, including government involvement that is ostensibly in the form of “support.”⁹⁴ Even government measures that seem to support religion in the short run—for example, the parochial school aid program that a bare majority of the Supreme Court upheld⁹⁵ in June 1997 (overturning the Court’s 1985 decision that had struck down this same program⁹⁶)—in the long run endanger religion’s independence and vitality. This was eloquently explained by Justice David Souter, dissenting from the Court’s 1997 ruling upholding parochial aid:

The rule [against government subsidization of religion] expresses the hard lesson learned over and over again in the American past and in the experiences of the countries from which we have come, that religions supported by governments are compromised just as surely as the religious freedom of dissenters is burdened when the government supports religion. . . . The ban against state endorsement of religion addresses the same historical lessons. . . . The human tendency, of course, is to forget the hard lessons, and to overlook the history of governmental partnership with religion when a cause is worthy, and bureaucrats have programs. That tendency to forget is the reason for having the Establishment Clause (along with the Consti-

93. GEORGE GALLUP, JR. & JIM CASTELLI, *THE PEOPLE’S RELIGION: AMERICAN FAITH IN THE 90’S* 48 (1989).

94. See *Weisman*, 505 U.S. at 608-09 (Blackmun, J., concurring). In *Weisman*, Justice Blackmun noted:

When the government favors a particular religion or sect, the disadvantage to all others is obvious, but even the favored religion may fear being “taint[ed] . . . with a corrosive secularism.” The favored religion may be compromised as political figures reshape the religion’s beliefs for their own purposes; it may be reformed as government largesse brings government regulation. Keeping religion in the hands of private groups minimizes state intrusion on religious choice and best enables each religion to “flourish according to the zeal of its adherents and the appeal of its dogma.”

Id.

95. *Agostini v. Felton*, 117 S. Ct. 1997 (June 23, 1997) (overturning a 1985 decision and holding that Establishment Clause was not violated by a government program under which public school teachers are sent into parochial schools to teach remedial classes there).

96. *Aguilar v. Felton*, 473 U.S. 402 (1985).

tution's other structural and libertarian guarantees), in the hope of stopping the corrosion before it starts.⁹⁷

The "corrosive" effect upon religion of breaches in the wall separating it from government are illustrated by the latest school prayer case decided by the Supreme Court, *Lee v. Weisman*.⁹⁸ The American Civil Liberties Union represented Daniel and Deborah Weisman, a father and daughter, who successfully argued that the First Amendment barred prayers at public school graduation ceremonies.⁹⁹ As is typically the case with any organized school prayers, the school in that case had certain guidelines that it issued to the members of the clergy who delivered the prayers, which were designed to make such prayers nonsectarian.¹⁰⁰ But, as the Court noted, this kind of government involvement with religion should be at least as troubling to believers as it is to nonbelievers.¹⁰¹

For devout believers, it is abhorrent for a government official to tell them and their religious leader what to include and what not to include in a prayer. A Baptist minister, with whom I have collaborated in defending both the Free Exercise and Non-Establishment Clauses of the First Amendment, has noted that, from a religious person's perspective, a so-called "nonsectarian prayer" is an oxymoron.¹⁰² If a statement is nonsectarian, he observes, it cannot be a prayer, but conversely, if it is a genuine prayer, it cannot be nonsectarian.¹⁰³ Consider the case of one student in Texas, the son of a Baptist minister, whose school officials recently told him that his "nonsectarian, nonproselytizing" prayer could not include the words "Jesus" or "God."¹⁰⁴ Complaining that he did not know how to pray without saying "Jesus," he sued the school for mental anguish caused by violating his religious freedom.¹⁰⁵

So, the price that must be paid to utter a school-sponsored prayer is precisely to strip it of its essential religious character, an affront to many devout people.¹⁰⁶ No wonder, then, that more reli-

97. *Agostini v. Felton*, 117 S. Ct. 1997, 2020-21 (1997) (Souter, J., dissenting) (citations omitted).

98. 505 U.S. 577 (1992).

99. *Id.* at 599.

100. *Id.* at 581.

101. *Id.* at 588-89.

102. Oliver S. Thomas, Remarks at the Law & Philanthropy Conference, New York University Law School (Oct. 15, 1993).

103. *Id.*

104. Pamela Coyle, *The Prayer Pendulum*, 81 A.B.A. J., Jan. 1995, at 62, 65.

105. *Id.*

106. See *Lynch v. Donnelly*, 465 U.S. 668, 727 (1984) (Blackmun, J., dissenting). Justice Blackmun, dissenting from the majority's rejection of an Establishment Clause

gious institutions signed *amicus* briefs in support of the ACLU's position in the *Weisman* case—opposing the school-organized graduation prayer—than on the other side.¹⁰⁷ Indeed, this inevitable problem has led even some members of the so-called “Religious Right” to criticize the ploy that is now being advocated by other members of the Religious Right: “student-initiated, nonproselytizing, nonsectarian” prayer at graduation ceremonies, pursuant to school-organized elections and school-administered guidelines.¹⁰⁸ For example, Kelly Shackelford, who is the Southwest Regional Director of the Rutherford Institute, has commented, “The whole point [of the Establishment Clause] is to keep government hands out of these things.”¹⁰⁹

By the same token, for those who are non-religious, or who follow different religious traditions from those asserted in the school-sponsored prayer, the exercise is equally problematical, as Justice O'Connor has well explained:

challenge to a city-sponsored nativity scene, stressed that, under the majority's rationale, “[t]he creche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning.” *Id.*

107. Briefs supporting the ACLU's clients, the Weismans, were filed by the Baptist Joint Committee on Public Affairs, the National Council of Churches of Christ in the U.S.A., the General Conference of Seventh-Day Adventists, and James E. Andrews as Stated Clerk of the Federal Assembly of the Presbyterian Church (U.S.A.), as well as several Jewish organizations, including the American Jewish Congress, the American Jewish Committee, the Anti-Defamation League of B'nai B'rith, and the National Jewish Community Relations Advisory Council. See Brief Amici Curiae of the American Jewish Congress, Baptist Joint Committee on Public Affairs, American Jewish Committee, National Council of Churches of Christ in the U.S.A., Anti-Defamation League of B'nai B'rith, General Conference of Seventh-Day Adventists, People for the American Way, National Jewish Community Relations Advisory Council, New York Committee on Public Education and Religious Liberty, and James E. Andrews as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) in Support of Respondents, *Lee v. Weisman*, 505 U.S. 577 (1992) (No. 90-1014). The specifically religious institutions that filed in support of the school district were the Southern Baptist Convention and the National Association of Evangelicals. See Brief of the Southern Baptist Convention Christian Life Commission as Amicus Curiae Supporting Petitioners, *Weisman* (No. 90-1014); Brief Amicus Curiae of the Christian Legal Society, National Association of Evangelicals, and the Fellowship of Legislative Chaplains, Inc. in Support of Petitioners, *Weisman* (No. 90-1014).

108. *Harris v. Joint Sch. Dist.* No. 241, 41 F.3d 447 (9th Cir. 1994), *vacated and remanded with directions to dismiss as moot*, 115 S. Ct. 2604 (1995); *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993); *ACLU v. Blackhorse Pike Regional Bd. of Educ.*, No. 93-5368 (3d Cir. 1993); *Friedmann v. Sheldon Community Sch. Dist.*, No. C93-4052 (N.D. Iowa 1993), *vacated on standing grounds*, 995 F.2d 802 (8th Cir. 1993); *Gearon v. Loudoun County Sch. Bd.*, 844 F. Supp. 1097 (E.D. Va. 1993).

109. *Coyle*, *supra* note 104, at 65.

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. E.g., *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.¹¹⁰

This adverse impact of government-endorsed religion is not just a matter of abstract constitutional theory. Its tangible damage is demonstrated by Deborah Weisman's experience. The most common question that she got about her case—and the one that the ACLU most often hears whenever we seek to enforce the Establishment Clause—is: "Why make such a big deal out of a small prayer?" Here is Deborah's answer to that question, speaking from her own experience as a public school student:

I don't think a little prayer is a small thing. It excludes. They forced me to pray to someone else's God. That is a big deal. . . . When I am forced to participate in a ritual . . . it's an attempt to make me different from what I am—to change my identity, to make me conform.¹¹¹

The desanctification of religion that results from the erosion of the wall separating it from government was deplored by Justice Harry Blackmun in a 1984 opinion. He was dissenting from the majority's rejection of an Establishment Clause challenge to a nativity scene that was sponsored by the City of Pawtucket, Rhode Island, in *Lynch v. Donnelly*.¹¹²

As an aside, harking back to my initial comments about how important it is to maintain one's sense of humor about these issues, I would like to quote a humorous barb that the Mayor of Pawtucket aimed at the ACLU, which brought the constitutional challenge to

110. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

111. William H. Freivogel, *They Forced Me to Pray To Someone Else's God*, ST. LOUIS POST-DISPATCH, Oct. 29, 1991, at 1B.

112. 465 U.S. at 726-27 (Blackmun, J., dissenting).

his city's creche. He quipped that the ACLU was opposing this government-mounted nativity scene due to jealousy, since "in the whole organization there aren't three wise men or a virgin!"¹¹³

In a far more serious vein, that same Mayor explained that his government supported the creche display for the quintessentially religious purpose of "putting Christ back in Christmas."¹¹⁴ Far from honoring that religious impulse, though, the Supreme Court's majority did exactly the opposite. In order to bolster their conclusion that this government-sponsored display was consistent with the Establishment Clause, the majority de-emphasized both the religious aspect of the creche display and the religious nature of Christmas, treating it as part of a broader "winter-holiday season"¹¹⁵ and emphasizing its secular and commercial aspects.¹¹⁶ From Justice Blackmun's perspective, this approach was demeaning to his Christian beliefs, as he explained:

While certain persons, including the Mayor of Pawtucket, undertook a crusade to "keep Christ in Christmas," the Court today has declared that presence virtually irrelevant. . . . The creche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of the display. . . . The city has its victory—but it is a Pyrrhic one indeed. . . . I cannot join the Court in denying either the force of our precedents or the sacred message that is at the core of the creche.¹¹⁷

Ironically, though, five years later, it was Justice Blackmun who held that—at least when displayed next to a municipally sponsored Christmas tree outside a government building—the menorah was a primarily secular symbol.¹¹⁸ He wrote that the combined display of the tree and the menorah "simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society."¹¹⁹ Justice O'Connor responded:

113. Laura M. Litvan, *Vienna Protests Ban of Religious Songs*, WASHINGTON TIMES, Dec. 7, 1992, at A1.

114. *Donnelly v. Lynch*, 525 F. Supp. 1150, 1161 (1981) (noting that "[t]he Mayor's insistence on preserving the creche was lauded by many as a determination to 'keep Christ in Christmas' and, more broadly, to keep God in American life").

115. *Lynch*, 465 U.S. at 680 (the generic phrase "winter-holiday season" later appeared in *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 575 (1989)).

116. *Id.*

117. *Lynch*, 465 U.S. at 726-27 (Blackmun, J., dissenting) (citations omitted).

118. *Allegheny*, 492 U.S. at 613-615.

119. *Id.* at 575.

Chanukah is a religious holiday with strong historical components particularly important to the Jewish people. Moreover, the menorah is the central religious symbol and ritual object of that religious holiday. Under Justice Blackmun's view, however, the menorah "has been relegated to the role of a neutral harbinger of the holiday season," almost devoid of any religious significance.¹²⁰

Justice Brennan agreed with her when he wrote:

Indeed, at the very outset of his discussion of the menorah display, Justice Blackmun recognizes that the menorah is a religious symbol. . . . That should have been the end of the case. But, as did the Court in *Lynch*, Justice Blackmun, "by focusing on the holiday 'context' in which the [menorah] appeared, seeks to explain away the clear religious import of the [menorah]" By the end of the opinion, the menorah has become but a coequal symbol, with the Christmas tree, of "the winter-holiday season." . . . Pittsburgh's secularization of an inherently religious symbol, aided and abetted here by Justice Blackmun's opinion, recalls the effort in *Lynch* to render the creche a secular symbol. As I said then: "To suggest, as the Court does, that such a symbol is merely 'traditional' and therefore no different from Santa's house or reindeer is not only offensive to those for whom the creche has profound significance, but insulting to those who insist for religious or personal reasons that the story of Christ is in no sense a part of 'history' nor an unavoidable element of our national 'heritage.'" . . . As Justice O'Connor rightly observes, Justice Blackmun "obscures the religious nature of the menorah and the holiday of Chanukah"¹²¹

As the preceding discussion has made clear, far from being hostile to religion, a strong defense of the Establishment Clause to the contrary is supportive of religion. Conversely, as I have already explained,¹²² those who have only a weak, limited view of the Establishment Clause are insensitive to the religious beliefs and practices of members of minority faiths.

C. The Myth That Christians in the U.S. Today Suffer Systematic Discrimination

The current drive to limit the Establishment Clause and to permit some government-sponsored religious exercises is driven by yet another pervasive myth: that Christians in the United States today

120. *Id.* at 633.

121. *Id.* at 643-44 (O'Connor, J., concurring) (citations omitted).

122. See *supra* text accompanying notes 108-110.

suffer systematic discrimination. This was a rallying cry in Pat Buchanan's campaign for the Republican Presidential nomination.¹²³ It was also a theme echoed in a widely-publicized talk that Justice Scalia gave at a prayer breakfast at a Baptist law school in Mississippi this spring.¹²⁴ Again, though, the exaggerated claims do not match the reality. In the United States, Christians in general, and evangelical Christians in particular, hardly face the systematic persecution that members of other religious denominations have suffered at various periods in U.S. history and in particular parts of the country.¹²⁵

There are undeniably instances in which particular Christian ministers, worshipers, and congregations have suffered attacks on their religious freedom. In such instances, the ACLU has defended the rights of victims of such violations, as we have defended the

123. See Patrick J. Buchanan, *Bellicose Barrage of Christian-Bashing*, WASH. TIMES, June 15, 1995 (asking "Are you now or have you ever been a Christian?" The way things are going, congressional committees are likely to be asking that question in a few years."); Amy Bayer, *Fighting Words Cost Buchanan; While Critics Assail His In-Your-Face Rhetoric, He Remains Unapologetic*, SAN DIEGO UNION-TRIB., Mar. 12, 1996, at B12 (quoting Buchanan: "We live in an age where the ridicule of blacks is forbidden, where anti-Semitism is punishable by political death, but where Christian-bashing is a popular indoor sport."); cf. Stephen Bates, *The Christ Coalition Nobody Knows*, THE WEEKLY STANDARD, Sept. 25, 1995, at 36 (discussing a comment by Ralph Reed that the Christian Right seeks a constitutional amendment guaranteeing freedom of religious speech in schools to keep schoolchildren from being discriminated against for expressing religious beliefs in public places).

124. Suzanne Fields, *Public Discussions Must Find a Place for Religious Faith*, THE DALLAS MORNING NEWS, May 19, 1996, at 5J (noting that "Supreme Court Justice Antonin Scalia, a Catholic, speaking to a prayer breakfast at the Mississippi College School of Law, a private Baptist institution, received a standing ovation when he said, 'We must pray for the courage to endure the scorn of the sophisticated world'").

125. In contrast, Christians do constitute a persecuted religious minority in other countries. See In the Lion's Den, Puebla Program on Religious Freedom at Freedom House (profiling eight countries where the persecution of Christians has been most treacherous in recent years. The study details the abuse, incarceration and killing of Christians in China, Egypt, Nigeria, North Korea, Pakistan, Saudi Arabia, Sudan, and Vietnam); Tom Carter, *Christians Face Eternal Struggle; Persecution Worsens as West Watches*, WASH. TIMES, Sept. 30, 1996, at A16 (noting that both Houses of Congress, in recognition of the world-wide onslaught, have approved resolutions supporting national day called "Persecution Sunday"). A.M. Rosenthal has written a series of columns that highlight the plight of Christians worldwide. See, e.g., A.M. Rosenthal, *On My Mind: Questions From West 47th Street*, N.Y. TIMES, June 10, 1997, at A27 (noting "persecution of Christians must be written about with consistency because it is taking place with consistency—more, not less."); A.M. Rosenthal, *On My Mind: Facing the Deniers*, N.Y. TIMES, May 20, 1997, at A23 (noting that "China prohibits Christians from worshiping in any churches except those 'patriotic' ones that submit to the Communist Party's religious-domination apparatus—registration, regulation, control of clerical appointments and censorship reaching into altar and pulpit, like forbidding preaching the Second Coming.").

rights of individuals and organizations of other religions (or of no religion) when they have been subject to similar attacks.¹²⁶ But there is no broad pattern in the U.S. of Christians suffering discrimination or hostility. To the contrary, Christians are in the ascendancy, both throughout our political system in general and in many school systems in particular.¹²⁷ Far from being the objects of ridicule, they are celebrated and courted by every major political figure.¹²⁸ President Clinton, Bob Dole, and other political officials and candidates routinely invoke God's blessing in public speeches.¹²⁹ As columnist Katha Pollitt recently noted in *The Nation*, it would be the kiss of death for a candidate, in contrast, to express an anti-Christian or anti-religious view.¹³⁰

The actual victims of persecution, discrimination, hostility, and ridicule—and worse—are not those who practice religion and seek government support for religion, but rather, those who dare to stand up for Establishment Clause values and to oppose government-sponsored religion. Many ACLU clients in Establishment Clause cases have suffered physical attacks on themselves, their families, their pets, their homes, and their property, as the price for defending religious liberty.

The ACLU often receives complaints from parents, students, and other members of the community about incidents involving government-sponsored indoctrination and inculcation of religion, including in the public schools, as well as persecutions, attacks, and criticisms because they are members of a minority religion. Often these victims of religious liberty violations do not want to pursue their legal remedies, even when we assure them they would win, because of the hostility, enmity, persecution, and attacks they

126. The ACLU has supported the religious freedom of, for example, Amish, Catholics, Hmong, Jehovah's Witnesses, Jews, Presbyterians. See generally SAM WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU (1990).

127. See John Nichols, *American Politics Needs a Religious Left*, CAPITAL TIMES, Sept. 19, 1996, at 12A (noting that "[t]he growth in political influence experienced by the Christian Coalition is testimony to the fact that Reed is a savvy political strategist.").

128. See James Robinson, *Candidates Paying Less Attention to the Religious Right*, AGENCY FRANCE PRESSE, Oct. 18, 1996 (stating, despite the article's title, that "Dole, and to a lesser extent Clinton, are trying . . . to court conservative Christians while hoping not to turn off middle-of-the-road centrist supporters.").

129. See Richard Scheinin, *A Rise in Presidential Piety*, THE TAMPA TRIBUNE, Oct. 5, 1996, at 4 (stating that "Clinton emphasizes his Southern Baptist roots and Dole his traditional Christian beliefs."). See also Bates, *supra* note 123, at 36 (noting that "President Clinton has repeatedly tried to reach out to conservative Christians.").

130. See Peter Steinfelds, *Beliefs*, N.Y. TIMES, Jan. 27, 1996, at 10 (discussing Ms. Pollitt's view that American politics is "drenched in religion.").

would face. I fully sympathize with their reluctance to make themselves into pariahs or even martyrs.

Too many ACLU clients who have asserted their First Amendment right to be free from government-sponsored religion have suffered tangibly, as well as psychologically, for doing so. Many have suffered physical assaults upon themselves and their property. One brave woman, Joann Bell, had her home burned to the ground because she dared to stand up for separation of church and state in a case involving the public elementary and junior high schools that her daughter and two sons attended in Little Axe, Oklahoma.¹³¹ The U.S. Tenth Circuit Court of Appeals agreed with Joann, her co-plaintiff Lucille McCord (who had two children in the Little Axe schools), and the ACLU that the school violated the Establishment Clause by sponsoring organized student prayer meetings at the beginning of the school day.¹³²

Like many of our clients who protest government-endorsed religious exercises, Joann and Lucille are religious people.¹³³ Precisely for that reason, they do not want the government, in the public schools or anywhere else, promoting any religious exercise, a matter that they believe belongs within the sphere of their own churches (or other religious institutions), families, and individual

131. At the time she approached the ACLU to represent her in challenging the school's violation of her family's religious liberty, Joann Bell had no previous contact with the ACLU. Indeed, she came from a conservative religious and political background, in which the ACLU was at best unknown and at worst deionized. Since 1990, though, Joann has been the Executive Director of the ACLU's Oklahoma affiliate. The silver lining to the cloud of Joann's heroic but harrowing struggle to defend the religious liberty of herself and her family is not only that she helped to secure religious liberty for everyone within the Tenth Judicial Circuit, but also that it led her to devote her energy and talent to defending the civil liberties of other individuals and families. As one journalist described Joann Bell and Lucille McCord, they are "'ordinary people' in the extraordinary sense of the word . . ." Rocky Scott, *Prayer Ruling Unlikely to Resolve Hard Feelings*, UPI, Dec. 11, 1982, BC cycle, available in LEXIS, News Library, Arcnws File. Also greatly deserving of commendation is the lawyer who, on behalf of the ACLU, represented Joann Bell and Lucille McCord on a *pro bono* basis: Norman, Oklahoma civil rights attorney Micheal Salem.

132. *Bell v. Little Axe Independent Sch. Dist.*, 766 F.2d 1391 (10th Cir. 1985). Teachers often attended, monitored, and participated in these sessions, which were advertised on classroom bulletin boards and devoted to "prayers, songs, and 'testimony' of students and other individuals concerning the benefits of knowing Jesus Christ." *Id.* at 1396-97.

133. See Scott, *supra* note 131:

Joann Bell was brought up in the Nazarene Church. Prayer sessions, 'giving testimony'—the practice of standing before others and speaking of religious experiences—and a strict moral code were a way of life. Lucille McCord has been a member of the Church of Christ for more than 40 years. . . . 'We try to live the Bible,' she said.

consciences.¹³⁴ As Lucille declared, "Leave the religion to me."¹³⁵ Joann, Lucille, and their children are Protestants; from the perspective of the Little Axe School District, though, they were just not "the right kind" of Protestant, the kind that had supported the school-sponsored religious activities.

Joann, Lucille, and their children were verbally and physically assaulted for successfully championing religious liberty.¹³⁶ At trial, Joann and Lucille testified that their children were harassed and insulted by teachers and students for not attending the daily school-organized prayer meetings.¹³⁷ After the suit was filed, upside-down crosses were taped to the children's school lockers and a prize-winning hog that belonged to Lucille's son, who was active in the school's Future Farmers of America chapter, had its throat slit.¹³⁸

At school board meetings, Joann and Lucille were publicly vilified for their views on religious liberty.¹³⁹ From the time the litigation began, they received numerous anonymous threatening telephone calls. They were also falsely listed on a "hot" check list at a local grocery store.¹⁴⁰

When Joann went to the school to check on her children after receiving news of a bomb threat there, she was attacked by a school employee, who repeatedly bashed her head against a car door and threatened to kill her.¹⁴¹ Joann was hospitalized with a sprained shoulder. She also lost a lot of hair.¹⁴²

The worst was yet to come, though. Shortly after the lawsuit was filed, Joann's family's home was burned to the ground while she was attending her son's football game.¹⁴³ Having received phone calls warning that her house would be torched, Joann is convinced that this was a case of arson.¹⁴⁴ While investigators said that the fire was of a "suspicious nature," they also said they were unable to

134. Rob Gloster, *Oklahoma Religion Suits Stir Bitter Feelings*, UPI, Nov. 7, 1981, available in LEXIS, News Library, Arcnws File.

135. *See id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. Letter from Micheal Salem, attorney representing Bell and McCord, to Nadine Strossen, President, ACLU (Aug. 14, 1995) (on file with the *Fordham Urban Law Journal*).

140. *Id.*

141. *See* Gloster, *supra* note 134.

142. *Id.*

143. *Id.*

144. *Id.*

find evidence as to who might have been responsible.¹⁴⁵ Joann believes the fire was set by someone who took literally a remark made by Little Axe School Board member Elizabeth Butts.¹⁴⁶ Asked to comment on the school employee's assault against Joann, Butts had said, "People who play with fire get burned."¹⁴⁷

Joann's neighbors told her that they had seen a truck leaving the area of her home shortly before the smoke became evident.¹⁴⁸ Joann believed that her neighbors' description of this truck matched that of a truck driven by someone who worked for a school board member. Although both the Fire Marshall and the FBI told her they thought it was a case of arson, no one was ever prosecuted.¹⁴⁹

To its credit, the Little Axe Volunteer Fire Department did show up at the fire. But, guess what? There was no water in their truck tanks, so they did not fight the fire. Imagine every single thing you own—every possession, every scrapbook, every piece of clothing, every family photograph and heirloom. That is what burned to the ground along with the Bells' home.¹⁵⁰

Joann, her husband, and their four children moved from Little Axe at the end of the school year.¹⁵¹ Joann's trial testimony underscored that, although she played a major role in successfully upholding constitutional guarantees of religious liberty, it was at an enormous personal cost for herself and her family. Fighting back tears, she testified: "I feel like we have been driven from the community. . . . People, I think, were ready to kill me if they could have gotten away with it."¹⁵²

The tragic experiences of the Bell and McCord families in Oklahoma constitute extreme examples, but alas only slightly more extreme than what many of our clients face when they dare to balk at government-supported religion in public schools. Let me cite another, more recent variation on the same theme, also involving a brave woman who dares to stand up for the religious liberty of herself and her children against a public school's attempts to inculcate religion. Like Joann Bell, she is a Christian, whose idea of Christi-

145. *Id.* See also Scott, *supra* note 131.

146. UPI, Dec. 8, 1982, *available in* LEXIS, News Library, Arcnws File.

147. *Id.*

148. Letter from Micheal Salem to Nadine Strossen, *supra* note 139.

149. *Id.*

150. *Id.*

151. See UPI, *supra* note 146.

152. *Id.*

anity is that it is a private matter, and not the business of the government or the government's schools.¹⁵³

When Lisa Herdahl moved to Ecu, Mississippi, with her husband and six children in 1993, she was shocked to learn that her children's public school sponsored regular religious activities, including daily prayers, Bible readings broadcast over the public address system, and a Bible studies class taught from a fundamentalist perspective.¹⁵⁴ When her children refused to participate in these school-organized religious activities, their classmates taunted and harassed them, calling them "atheists" and "devil worshipers." When a teacher put earphones on one of Lisa's sons to drown out the broadcast prayer and Bible readings, other children started mocking him as "football head."¹⁵⁵

Because school officials repeatedly refused Lisa's requests to respect her children's rights, she turned to the ACLU to challenge the school's practices.¹⁵⁶ In 1995, the judge granted our motion for a preliminary injunction, enjoining the school district from transmitting the morning prayers and Bible readings or permitting student-led religious activities during school hours.¹⁵⁷ The judge found that Lisa's children could likely feel stigmatized for exercising their First Amendment rights to opt out of the school-sponsored devotional exercises, which he held unconstitutional.¹⁵⁸ In 1996, the district court permanently enjoined and restrained the defendants.¹⁵⁹

153. See John Burnett, *Mississippi Parent Challenges School Prayer and Wins* (National Public Radio Morning Edition broadcast, Apr. 19, 1995) (noting that "[t]he Hurdall's [sic] are practicing Lutherans who believe religion has no place in public schools").

154. Stephanie Saul, *A Lonely Battle in the Bible Belt; A Mother Fights to Halt Prayers at Mississippi School*, *NEWSDAY*, Mar. 13, 1995, at A8.

155. *Id.*

156. *Id.*

157. *Herdahl v. Pontotoc County Sch. Dist.*, 887 F. Supp. 902, 912 (N.D. Miss. 1995). See also Burnett, *supra* note 153; *Mississippi Mom Calls Gingrich Idea "Completely Nuts,"* *REUTERS*, June 18, 1995, available in LEXIS, News Library, Arcnws File. In June, 1996, the judge issued an order permanently enjoining these school-sponsored religious activities. 933 F. Supp. 582, 699-700 (N.D. Miss. 1996).

158. *Herdahl*, 887 F. Supp. at 911-12.

159. The permanent injunction reads as follows:

That each of the defendants and anyone acting in concert with any of them are permanently ENJOINED AND RESTRAINED from (1) transmitting or authorizing the transmission of devotionals, including without limitation the recitation of Bible verses and/or prayers, over the school intercom system; (2) authorizing organized, vocal group prayers in classrooms during classroom hours at North Pontotoc; (3) authorizing the teaching of classes known as "Bible" or "A Biblical History of the Middle East," in their past or

Successful as Lisa Herdahl's defense of religious liberty was, life for her and her family became even harder after the lawsuit was started. As one press account reported, "[t]he lawsuit mobilized the community against Herdahl."¹⁶⁰ Virtually every house and business posted a sign opposing the Herdahls' fight for religious freedom. Lisa says that she has been made an outcast in the community, with people whispering about her in grocery stores, and threats of organizing a boycott against the convenience store she managed.¹⁶¹ She also received a death threat, and her convenience store received a bomb threat.¹⁶² Lisa not only lost her job at the convenience store, but she also cannot get another job, due to the unpopularity of her defense of religious liberty; she has been described as "unemployable in the entire state of Mississippi," be-

present form, in any grade; and (4) authorizing the showing of the videotapes "The King is Born," "He is Risen," and "America's Godly Heritage" during American History classes; and

That the defendants shall specifically direct all elementary teachers and other employees at North Pontotoc, and strictly enforce its directive, that they may not facilitate, participate in, endorse, encourage, invite or sponsor classroom prayer by students, including but not limited to designating, facilitating or assisting in designating, or enlisting individual students to lead vocal group prayer, delaying or slowing departure of students for the lunchroom to facilitate prayer, separating students who do and do not wish to engage in such prayer, or engaging in the conduct concerning the "Blessing for Lunch" contained in the instructions issued by defendant Flowers on or about January 3, 1995 as set forth in Exhibit P3; and

That if the Mississippi State Board of Education does give final approval to the new high school course "Biblical History of the Ancient Middle East," the defendants may offer that course in those grades (9-12), but the defendants and anyone acting in concert with them are permanently ENJOINED from teaching that or any other or successor course concerning the Bible or religion in any manner that is not consistent with this court's decision and the United States Constitution. This includes but is not limited to the following: (a) the course must be taught objectively as part of a secular program of education; (b) the course may not be taught using the Bible as the only source of historical fact or as if the Bible were actual literal history; (c) students must be assigned reading from non-biblical sources of ancient Middle East history; (d) the course may not teach religious doctrine or sectarian interpretation of the Bible; and (e) the District shall not accept an instructor for the Bible course who has been approved for employment based in whole or in part on a religious test, profession of faith or criteria involving particular beliefs about the Bible in the selection process.

933 F. Supp. 582, 599-600 (N.D. Miss. 1996).

160. Saul, *supra* note 154.

161. *Id.*

162. Telephone Interview with David Ingebretsen, Executive Director, ACLU of Mississippi (Aug. 23, 1995).

cause of the state-wide publicity about her insistence that her children's school respect their First Amendment rights.¹⁶³

The ostracism and worse reactions that are often faced by those who defend freedom of religion and conscience against governmental inculcation were indicated by an ACLU staff member whom U.S. Supreme Court Justice Harry Blackmun quoted in a Court opinion.¹⁶⁴ To illustrate the dangerous societal divisiveness that results from government-sanctioned religious exercises, Justice Blackmun quoted Michelle Parish, who was then the Executive Director of the ACLU of Utah:

[Of] all the issues the ACLU takes on—reproductive rights, discrimination, jail and prison conditions, abuse of kids in the public schools, police brutality, to name a few—by far the most volatile issue is that of school prayer. Aside from our efforts to abolish the death penalty, it is the only issue that elicits death threats.¹⁶⁵

The harassment and threats to which Establishment Clause advocates are subject are underscored by an order that the ACLU recently won from a federal judge in Idaho. In that case, challenging prayers that are organized and sponsored by a public school, our clients were—as is common in such cases—proceeding under pseudonyms. The school's lawyers had sought to have our clients' identities revealed to them in a confidential proceeding in the judge's chambers. However, our attorneys presented evidence and arguments demonstrating the serious risks of harassment and violence directed against our clients, should their identities be revealed. The judge was persuaded of these dangers and therefore

163. In June, 1997, the ACLU presented Lisa Herdahl with its 1997 Roger Baldwin Medal of Liberty. Named in honor of the ACLU's principal organizer, this Medal is the highest honor that the ACLU bestows. It is presented biennially to recognize either distinguished lifetime contributions, or an exceptional particular contribution, to civil liberties in the United States. Lisa was nominated for this award by a distinguished Screening Committee: Drew Days, Professor at Yale Law School and former Solicitor General of the United States; Dr. Joycelyn Elders, Professor at the University of Arkansas Medical School and former Surgeon General of the United States; Katha Pollitt, columnist and editor of the Nation Magazine; Oliver Thomas, Baptist minister and First Amendment lawyer, Special Counsel to the National Council of Churches and the Freedom Forum First Amendment Center; Arlinda Locker, a leading attorney specializing in Native American rights; and Diana Daniels, Vice President and General Counsel of The Washington Post.

164. *Lee v. Weisman*, 505 U.S. 577, 607 n.10 (1992) (Blackmun, J., concurring).

165. *Id.* (Blackmun, J., concurring) (quoting Michele A. Parish, *Graduation Prayer Violates the Bill of Rights*, UTAH B.J. June-July 1991, at 19).

denied the request to reveal our clients' identities even in the limited fashion sought by the school's lawyers.¹⁶⁶

D. Problems with Justice Scalia's Narrow Construction of the Establishment Clause

During his lecture at JTS last month, Justice Scalia stressed his extremely narrow view of the Establishment Clause, maintaining that it does not prohibit the government from sponsoring religious exercises, but that it only prohibits the government from sponsoring specifically sectarian exercises.¹⁶⁷ This circumscribed interpretation of the Establishment Clause is often denominated (no pun intended) the "nonpreferentialist" view,¹⁶⁸ since it posits that government may support religion in general, but just may not act in a way that prefers any particular religion (or, concomitantly, that discriminates against any particular religion).

Even applying Justice Scalia's own preferred approach to constitutional interpretation, historic analysis, this nonpreferentialist theory is not justified. In his dissenting opinion in *Lee v. Weisman*, Justice Scalia set forth his nonpreferentialist interpretation of the Establishment Clause, asserting that this interpretation was supported by the legislative history underlying the Clause.¹⁶⁹ But Justice Souter's concurring opinion met and bested Justice Scalia on his own ground of historical interpretation. Citing historical research by University of Texas Law Professor Douglas Laycock,¹⁷⁰ Justice Souter reviewed the substantial evidence that the framers did consider language that would have barred only government aid to specific sects, but then deliberately rejected these narrower formulations, in favor of the open-ended, broad prohibition in the Establishment Clause.¹⁷¹ As Justice Souter concluded:

166. *Jane Doe v. Madison School Dist. No. 321*, Civil Case # 90-0518-E-EJL (reversing prior ruling requiring identity revelation because he saw no compelling interest for it). As this article went to press, the ACLU brought a lawsuit against school officials in Pike County, Alabama on behalf of four Jewish students who were persecuted for their religious beliefs and for their resistance to the school's persistent promotion of Christianity. See Sue Anne Pressley, *Tough Lessons in an Alabama Town; Jewish Children Persecuted at School, Parents Charge in Lawsuit*, WASH. POST, Sept. 2, 1997, at A3.

167. See *Lee*, 505 U.S. at 641 (Scalia, J., dissenting).

168. See Douglas Laycock, *The Origins of the Religion Clauses of the Constitution: "Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986).

169. *Lee*, 505 U.S. at 641.

170. Laycock, *supra* note 168, at 884-85.

171. *Lee*, 505 U.S. at 609-16 (Souter, J., concurring).

What is remarkable is that, unlike the earliest House drafts or the final Senate proposal, the prevailing language is not limited to laws respecting an establishment of "a religion," "a national religion," "one religious sect," or specific "articles of faith." The Framers repeatedly considered and deliberately rejected such narrow language and instead extended their prohibition to state support for "religion" in general.

Implicit in their choice is the distinction between preferential and nonpreferential establishments, which the weight of evidence suggests the Framers appreciated. . . . Of particular note, the Framers were vividly familiar with efforts in the colonies and, later, the States to impose general, nondenominational assessments and other incidents of ostensibly ecumenical establishments. . . . The Virginia Statute for Religious Freedom, written by Jefferson and sponsored by Madison, captured the separationist response to such measures. Condemning all establishments, however nonpreferentialist, the Statute broadly guaranteed that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever," including his own

What we thus know of the Framers' experience underscores the observation of one prominent commentator, that confining the Establishment Clause to a prohibition on preferential aid "requires a premise that the Framers were extraordinarily bad drafters—that they believed one thing but adopted language that said something substantially different, and that they did so after repeatedly attending to the choice of language." . . . We must presume, since there is no conclusive evidence to the contrary, that the Framers embraced the significance of their textual judgment.¹⁷²

Justice Souter's opinion in *Lee v. Weisman* also pointed to another problem with the nonpreferentialist version of the Establishment Clause, which was vividly demonstrated by Justice Scalia's answer to a question after his lecture at the JTS last month. As Justice Souter observed:

[N]onpreferentialism requires some distinction between "sectarian" religious practices and those that would be, by some measure, ecumenical enough to pass Establishment Clause muster. [B]y requiring the enquiry, nonpreferentialists invite the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.¹⁷³

172. *Id.* at 614-16 (quoting Laycock, *supra* note 168, at 882-83).

173. *Id.* at 616-17.

Indeed, after his JTS lecture, Justice Scalia raised some questions about his competence to make such a determination. A woman in the audience asked Justice Scalia why the rabbi's prayer in *Lee v. Weisman*, which closely paraphrased a traditional Jewish prayer of thanksgiving—the “Shehecheyanu”—did not violate even Justice Scalia's limited view of the Establishment Clause. I wrote down his exact answer. He said that, despite its traditional Jewish nature, the prayer at issue in *Weisman* was nonetheless not sufficiently “sectarian” to trigger his limited version of the Establishment Clause because it was “*not uncongenial to any other religion.*” I fully share the questioner's flabbergasted response, which she expressed in these understated terms: “That's a very interesting view of sectarianism.” One has to wonder, if Justice Scalia does not deem this government-sponsored prayer sufficiently sectarian to violate his nonpreferentialist conception of the Establishment Clause, what government-sponsored prayer, if any, would satisfy that limited conception.

IV. Free Exercise Clause

Last month, in introducing Justice Scalia, Rabbi Vizotsky announced the title and subject of Justice Scalia's lecture as concerning “the religion clauses” of the First Amendment. However, Justice Scalia's lecture focused on only one of those two clauses, the Establishment Clause. He studiously omitted any sustained discussion of its companion guarantee of religious liberty, the Free Exercise Clause. Rather, he dismissively indicated that it should not be given much weight or scope. This omission is completely consistent with Justice Scalia's key role in decimating the Free Exercise Clause through his majority opinion in *Employment Division, Department of Human Resources v. Smith*, in 1990.¹⁷⁴ The *Smith* decision has been described by experts as “the *Dred Scott* of First Amendment law,”¹⁷⁵ making “a dead letter”¹⁷⁶ of the Free Exercise Clause.

The scope of the damage that the *Smith* decision inflicted on religious freedom rights under the Free Exercise Clause is most directly expressed in the title of the statute that Congress subsequently passed as a “legislative fix” for that damage, the

174. 494 U.S. 872, 874 (1990).

175. See Oliver Thomas, *Religious Freedom Finally has a Friend in the White House*, DALLAS MORNING NEWS, Nov. 5, 1995, at 5J.

176. Oliver Thomas and David Saperstein, *Religious Freedoms: Lost and in Need of Restoration?*, THE RECORDER, Aug. 13, 1993, at 8.

"Religious Freedom Restoration Act."¹⁷⁷ Of course, no legislation can ever completely "fix" a Supreme Court decision that cuts back on constitutional protections, and no legislation can ever fully "restore" constitutional rights that have been judicially diminished. Because legislation can always be repealed through ordinary legislative processes, it does not afford the security and stability for rights that the Constitution does. In contrast, at least in theory, constitutional rights should be subject to limitation only through the arduous super-majoritarian process of constitutional amendment.¹⁷⁸ Of course, as the *Smith* case itself illustrates, the Court can in effect truncate constitutional rights through its (mis)interpretation of them.

In June 1997, with Justice Scalia's support, the majority of the Supreme Court compounded the damage that had been done to free exercise rights in *Smith*, by holding that the Religious Freedom Restoration Act was itself unconstitutional.¹⁷⁹ As Justice O'Connor noted in her dissent, by abridging constitutional rights, decisions such as *Smith* are particularly devastating, since "—as this case so plainly illustrates—'correction through legislative action is practically impossible.'"¹⁸⁰ Accordingly, Justice O'Connor again sharply criticized *Smith*—as she had done in her separate opinion in the *Smith* case itself¹⁸¹—and urged the Court to re-examine it, explaining: "[I]n light of both our precedent and our Nation's tradition of religious liberty, *Smith* is demonstrably wrong."¹⁸² Justices Souter and Breyer joined Justice O'Connor's call for a re-examination of *Smith*.¹⁸³ For example, Justice Souter expressed "serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence."¹⁸⁴

In his *Smith* opinion, Justice Scalia ruled that as long as the government does not overtly or intentionally discriminate against adherents of particular religious beliefs when it enacts a generally applicable law, the Free Exercise Clause does not insulate such adherents from complying with the law, even at the cost of violating

177. 42 U.S.C.A. § 2000bb to 2000bb-4 (1993).

178. U.S. CONST. art. V.

179. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (holding that Congress had exceeded the scope of its enforcement power under section 5 of the Fourteenth Amendment).

180. *Boerne*, 117 S. Ct. at 2177 (quoting *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114 (1996) (slip op., at 18)).

181. *Smith*, 494 U.S. at 891.

182. *Boerne*, 117 S. Ct. at 2177.

183. *Id.*

184. *Id.* at 2186.

sincere religious beliefs.¹⁸⁵ In so ruling, the Court abandoned the accepted understanding of the Free Exercise Clause as providing some absolute protection against government measures that substantially burden sincere religious belief.¹⁸⁶ Justice Scalia's view of the religious liberty guaranteed by the Free Exercise Clause is as narrow as his view of the religious liberty guaranteed by the Establishment Clause. According to his *Smith* opinion, the Free Exercise Clause amounts merely to a shadow of the Equal Protection Clause, guaranteeing only formally equal treatment of all religious beliefs; so long as a governmental rule on its face applies equally to all religious beliefs and was not intentionally designed to have an adverse impact on any particular faith, then it is constitutionally irrelevant that the rule in fact has such an adverse impact. The religious believers whose free exercise rights are in fact—albeit inadvertently—burdened unequally by a facially neutral rule are deprived of any constitutional recourse.

This sterile view of the Free Exercise Clause severely cripples its ability to protect members of minority religious groups. In her concurring opinion, which excoriated the abrogation of longstanding Free Exercise Clause standards in Justice Scalia's majority opinion, Justice O'Connor noted:

[F]ew States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. . . . If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice.¹⁸⁷

185. *Smith*, 494 U.S. at 876-80. This paragraph, as well as the remainder of this section, is based upon Nadine Strossen, *Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 HASTINGS L.J. 285, 382-88 (1991).

186. This previously accepted interpretation of the Free Exercise Clause is exemplified in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in which the Court held that the Free Exercise Clause required the state to exempt from its compulsory education requirement Amish children whose parents' sincere religious beliefs would have been violated by maintaining their children in school beyond age 13. The Court in *Yoder* noted:

[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.

Id. at 219-20.

187. *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in judgment). Justice O'Connor further observed: "There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can

Justice O'Connor concluded that the majority's new rule "relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides."¹⁸⁸

To understand how truncated Justice Scalia's view of the Free Exercise Clause is, one should consider the Supreme Court's traditional interpretation and enforcement of that clause.¹⁸⁹ In stark contrast with Justice Scalia's view that the clause prohibits only laws that facially, intentionally discriminate against particular religious beliefs, the Court traditionally viewed it as guaranteeing some absolute degree of freedom from government burdens on religious exercises, regardless of how equally or widely dispersed those burdens might be, and regardless of whether the government imposed them inadvertently rather than intentionally.¹⁹⁰ Prior to *Smith*, the Supreme Court consistently held that the Free Exercise Clause requires the government to exempt an individual from a general legal obligation if it substantially burdened the individual's free exercise of religious beliefs, unless a nonexemption policy would survive strict judicial scrutiny—*i.e.*, the government could show that, due to the exemptions, it could not substantially achieve a goal of compelling importance.¹⁹¹

coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion." *Id.* at 901.

188. *Id.* at 894 (quoting *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141-42 (1987) (quoting *Bowen v. Roy*, 476 U.S. at 727 (O'Connor, J., concurring in part and dissenting in part))).

189. See *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 570-71 (1993) (Souter, J., concurring) (stating that "whatever *Smith's* virtues, they do not include a comfortable fit with settled law").

190. See, e.g., *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in judgment) (citations omitted) (stating that "[t]he First Amendment . . . does not distinguish between laws that are generally applicable and laws that target particular religious practices . . . Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice."); *Yoder*, 406 U.S. at 214-20; *Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940).

191. See, e.g., *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (reaffirming that "[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling government interest justifies the burden"); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987) (noting that laws burdening religion "must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest"); *United States v. Lee*, 455 U.S. 252, 257-58 (1982) (stating that "[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest"); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (stating that "[t]he state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest"); *Yoder*, 406 U.S. at 215 (stating that "only those interests of the highest order

A leading case in establishing this understanding of free exercise rights was *Sherbert v. Verner*.¹⁹² In *Sherbert*, the Court held that a state was required to exempt a Sabbath observer from the general obligation of being available for Saturday work as a precondition for receiving unemployment compensation.¹⁹³ The Court made clear that the Free Exercise Clause was not satisfied by the mere fact that the state had treated all individuals equally with respect to their free exercise rights, insofar as all individuals were subject to the Saturday work requirement.¹⁹⁴ Nor did the Court deem the Free Exercise Clause to be satisfied by the mere fact that the state had not intentionally discriminated against Sabbatarians in crafting its rules governing unemployment compensation. It was undisputed that the state simply had not considered the differential adverse impact that the facially nondiscriminatory requirement would have on adherents of certain religious beliefs.¹⁹⁵

In *Sherbert*, the Court underscored that the Free Exercise Clause assured an absolute right to freedom from any substantial burden on the exercise of one's beliefs, no matter how equally or inadvertently that burden might have been imposed. That right could be limited only if the government could satisfy the heavy burden of proving that exempting the religiously burdened individual from the general obligation would prevent it from substantially achieving an objective of compelling importance.¹⁹⁶

After *Sherbert*, the Court consistently enforced these Free Exercise Clause principles in a line of cases that culminated in 1989 with *Hernandez v. Commissioner of Internal Revenue*.¹⁹⁷ In *Smith*, the Court departed from this long line of precedent and issued a general holding that strict scrutiny is an inappropriately rigorous standard for reviewing government measures that substantially burden religious freedom.¹⁹⁸

and those not otherwise served can overbalance legitimate claims to the free exercise of religion"); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (noting that a generally applicable regulation can be applied to a religious objector only if "some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment rights").

192. 374 U.S. 398 (1963).

193. *Id.* at 403-04.

194. *Id.* at 404-06.

195. *Id.* at 406-09.

196. *Id.* at 408-09.

197. 490 U.S. 680, 699 (1989).

198. In three pre-*Smith* cases, the Court rejected Establishment Clause claims, over strong dissents, citing particular reasons why it should not apply the strict scrutiny of *Smith* and its progeny to those specific cases. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (rejecting challenge to federal govern-

The Court's abandonment of meaningful judicial scrutiny was particularly startling in *Smith* because the government had never challenged the strict standard that, consistent with longstanding Supreme Court precedent, the courts below had applied. Therefore, this subject was not addressed in the parties' briefs or in oral argument. The briefs and argument were confined to the sole issue on which the Supreme Court granted review: whether a state's failure to exempt the sacramental use of peyote by members of the Native American Church from the state's general drug laws survived strict judicial scrutiny.¹⁹⁹

Never, throughout the protracted history of the litigation in *Smith*—which had been before the Supreme Court on a previous occasion²⁰⁰—had any court or party argued that the challenged state action, which clearly imposed a substantial burden on the religious exercise of Native American Church members, should be reviewed under a less exacting standard than strict scrutiny. Yet, without the benefit of briefs or oral arguments, the majority, *sua sponte*, refused to assess the state's nonexemption under a strict scrutiny standard and even refused to review that nonexemption under any standard at all. The Court merely announced a new *per se* rule that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct

ment's logging and road construction activities on lands sacred to several Native American tribes, even though it was undisputed that these activities "could have devastating effects on traditional Indian religious practices"); *Bowen v. Roy*, 476 U.S. 693 (1986) (rejecting challenge to federal benefits statute requiring benefit applicants and recipients to supply their Social Security numbers, despite claim by Native American parents that it would violate their religious beliefs to obtain and provide a Social Security number for their daughter); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (rejecting challenge to Air Force regulations that forbade the wearing of a yarmulke by an ordained Orthodox Jewish rabbi who was a commissioned Air Force officer working as a clinical psychologist on an Air Force base, despite his sincere belief that he had a religious obligation to wear it).

In both *Roy* and *Lyng*, the Court expressly distinguished *Sherbert* on the ground that the First Amendment does not "require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Roy*, 476 U.S. at 699 (emphasis in original); accord *Lyng*, 485 U.S. at 449-50. In *Goldman*, the Court emphasized the tradition of judicial deference to military regulations. See *Goldman*, 475 U.S. at 507 (stating that "[o]ur review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society").

199. See *Petition for Writ of Certiorari, Employment Division v. Smith*, 494 U.S. 872 (1990) (No. 88-1213).

200. See *Smith*, 494 U.S. at 874 (describing procedural history). The Supreme Court's previous decision in *Smith* is reported at 485 U.S. 660 (1988).

that the State is free to regulate,"²⁰¹ notwithstanding the Free Exercise Clause.²⁰²

Justice Scalia's majority opinion in *Smith* candidly acknowledges that its reasoning would eliminate the Free Exercise Clause's role as the guarantor of religious liberty for adherents of minority religions, relegating their freedom to the good will of legislative majorities.²⁰³ Moreover, Justice Scalia acknowledges that legislative majorities may well be unsympathetic to the religious liberty concerns of members of minority religions. As he said, "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."²⁰⁴ That this observation is an understatement is indicated by the fact that *Smith* itself, as well as two other recent cases in which the Court has rejected Free Exercise Clause claims—*Bowen v. Roy*²⁰⁵ and *Lyng v. Northwest Indian Cemetery Protective Association*²⁰⁶—all involved formally neutral government measures that severely undermined the free exercise rights of Native Americans. Justice Scalia's conclusory response was that discriminatory truncation of the constitutional rights of minority groups is the "unavoid-

201. *Smith*, 494 U.S. at 878-79; see *Boerne*, 117 S. Ct., at 2186 (Souter, J., dissenting) (noting that the Court had never had "briefing and argument on the merits of [the *Smith*] rule . . . in any case, including *Smith* itself").

202. The Court's sweeping revision of Free Exercise Clause jurisprudence was the basis for a petition for rehearing that was jointly filed by a broad array of constitutional scholars, religious organizations, and other individuals and groups. That petition, which the Court denied, read in part as follows:

Because the Court's far-reaching holding resolved an issue not briefed by the parties, because recent research on the history of the Free Exercise Clause demonstrates that the broader reading of the Clause rejected by the Court . . . was contemplated by the Framers of the First Amendment, and because assertions that the Court has "never held" that the Free Exercise Clause requires government to justify unintended burdens on free exercise must come as a surprise to the federal and state courts, state attorneys general, and treatise writers who have uniformly read this Court's Free Exercise decisions from as far back as at least *Sherbert v. Verner*, as holding precisely that, a rehearing is appropriate.

Petition for Rehearing, Employment Div., Dep't of Human Resources v. *Smith*, 494 U.S. 872 (1990), *reh'g denied*, 496 U.S. 913 (June 4, 1990).

203. See *Smith*, 494 U.S. at 890.

204. *Id.*

205. 476 U.S. 693 (1986) (rejecting free exercise challenge to federal benefits statute requiring benefit applicants and recipients to supply their Social Security numbers, despite claim by Native American parents that it would violate their religious beliefs to obtain and provide a Social Security number for their daughter).

206. 485 U.S. 439, 450-51 (1988) (Douglas J., concurring) (rejecting free exercise challenge to federal government's logging and road construction activities on lands sacred to several Native American tribes, even though it was undisputed that these activities "could have devastating effects on traditional Indian, religious practices").

able consequence of democratic government.”²⁰⁷ This cavalier conclusion, though, shirks the Court’s historic responsibility to avoid such consequences. As Justice O’Connor retorted, “[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility.”²⁰⁸

Completely contrary to Justice Scalia’s view about the power of majorities to deprive minorities of their fundamental rights, the very purpose of the Bill of Rights, and of the Supreme Court in enforcing it, is to protect the rights of minority groups and individuals from what James Madison called “the tyranny of the majority.”²⁰⁹ It is worth recalling the eloquent words of Justice Jackson in *West Virginia Board of Education v. Barnette*, as quoted above.²¹⁰

In *Smith*, this powerful statement of central constitutional principle is relegated to Justice O’Connor’s concurrence,²¹¹ rather than being cited by Justice Scalia’s majority opinion. Even more disturbing, Justice Scalia’s opinion twice relies²¹² on *Minersville School District v. Gobitis*,²¹³ the long-since discredited decision that rejected the religious freedom claims of Jehovah’s Witness schoolchildren whose faith prevented them from honoring mandatory flag salute laws. Even the Court that decided *Gobitis* considered it so clearly erroneous that it overruled the decision, with only one dissent, just three years later in *Barnette*. It is an ominous sign that, in citing *Gobitis*, Justice Scalia’s opinion does not even note the fact that this decision was subsequently overruled, much less abide by the fundamental principles enunciated in the landmark decision overruling *Gobitis*.

As Justice O’Connor’s opinion recognized, minority religions are always the hardest hit by any cutback on religious freedom.²¹⁴ Accordingly, in the wake of the *Smith* decision, before the enactment of the Religious Freedom Restoration Act to repair some of its damage, federal judges were unable to enforce the Free Exercise

207. *Smith*, 494 U.S. at 890 (1990).

208. *Id.* at 902 (O’Connor, J., concurring).

209. THE FEDERALIST No. 10 (James Madison).

210. See *supra* note 52 and accompanying text.

211. *Smith*, 494 U.S. at 902 (O’Connor, J., concurring).

212. *Id.* at 879.

213. 310 U.S. 586 (1940), overruled by *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

214. *Smith*, 494 U.S. at 902 (O’Connor, J., concurring in judgment).

Clause to protect the religious liberty of members of minority faiths.²¹⁵

In one of the most poignant opinions of this sort, Judge Raymond Pettine of the Federal District Court in Rhode Island had previously upheld the free exercise rights of a Hmong family whose religious beliefs were violated by a state law mandating autopsies for accident victims; according to their beliefs, when a body is autopsied, the soul cannot go to Heaven. Therefore, this family was tormented by the belief that the soul of their son, who had been killed in an automobile accident, and who had subsequently been autopsied, would be condemned to wander the Earth. Relying on the Supreme Court's longstanding Free Exercise Clause doctrine, Judge Pettine had granted their claim. However, in the interim between his ruling on the merits of their claim and the hearing on the issue of damages, the Supreme Court issued its *Smith* decision, repealing established Free Exercise Clause precedents and principles. Accordingly, Judge Pettine was forced to reverse his previous ruling. His rueful comment in doing so

215. See, e.g., *Cornerstone Bible Church v. Hastings*, 948 F.2d 464 (8th Cir. 1991) (holding that application of city's zoning laws to prevent a church from conducting services in an area zoned for commercial uses raised no free exercise concerns, even though the city permitted secular not-for-profit organizations in that area); *Rector of St. Bartholomew's Church v. New York*, 914 F.2d 348, 355 (2nd Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (rejecting free exercise claim where city's application of facially neutral landmark designation law "drastically restricted the Church's ability to raise revenue to carry out its various charitable and ministerial programs"); *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd*, 940 F.2d 661 (6th Cir. 1991) (compelling autopsy despite contrary, deeply felt conservative Jewish beliefs); *United States v. Philadelphia Yearly Meeting of Religious Soc'y of Friends*, 753 F. Supp. 1300 (E.D. Pa. 1990) (compelling the Society of Friends, commonly known as "the Quakers," to enforce an IRS levy against two employee-members who conscientiously refused to pay the military portion of their federal taxes despite the Friends' assertion that the IRS could not compel the Society to violate the religious beliefs of members by acting as an enforcement arm of the government); *Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990) (denying damages to grieving parents who were adherents of the Hmong faith after an autopsy was performed on their son against the dictates of their religion); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 278-80 (Alaska), *cert. denied*, 115 S. Ct. 460 (1994) (holding that landlord's refusal to rent to an unmarried couple violated state fair housing law and could not be excused on the ground that landlord sincerely believed that renting would facilitate fornication, and would therefore be sinful); *Smith v. Fair Employment & Housing Comm'n*, 51 Cal. Rptr. 2d 700, 709, 719 (Cal. 1996), *cert. denied*, 117 S. Ct. 2531 (1997) (holding that religious landlord could not discriminate against unmarried couples regardless of the religious beliefs of the landlord); *State v. Hershberger*, 462 N.W. 2d 393 (Minn. 1990) (holding that the Free Exercise Clause provided no basis for exempting an Amish farmer from displaying a bright orange triangle on his buggy, to which the farmer objected on religious grounds, even though the evidence showed that another material would have served the State's purpose equally well).

underscores Justice Scalia's gutting of the Free Exercise Clause, as a potential protector of minority religious beliefs: "While I feel constrained to apply the majority's opinion to the instant case, I cannot do this without expressing my profound regret and my own agreement with Justice Blackmun's forceful dissent."²¹⁶

As members of a minority religion, Jews also suffered inroads on their religious liberty in the period after the Court rendered *Smith* and before Congress enacted, and the President signed, the Religious Freedom Restoration Act. In one case, parallel to the Hmong case just described, a Jewish accident victim was subject to an unnecessary autopsy in violation of his mother's religious beliefs.²¹⁷ In other situations, Orthodox Jewish prisoners were forced to choose between eating pork or no meat at all.²¹⁸

It is doubly ironic that Justice Scalia has played such a significant role in decimating the Court's and Constitution's support for religious freedom, because that constitutional revisionism flies in the face of two concerns that Justice Scalia has stressed in other contexts.

First, eliminating the Free Exercise Clause as a meaningful source of support for religious liberty is inconsistent with Justice Scalia's stated concerns about the religious liberty of Christians in the U.S., which he considers to be embattled.²¹⁹ Second, Justice Scalia's radical rewriting of Free Exercise Clause jurisprudence in *Smith* was undertaken without any consideration of the history and tradition which he has otherwise stressed²²⁰—including in his lecture at JTS²²¹—should be the underpinning of all constitutional decisionmaking. As Justice O'Connor explained in her dissenting opinion in the Court's 1997 decision that invalidated the Religious Freedom Restoration Act and reaffirmed *Smith*—*City of Boerne v. Flores*—the historical evidence supports the Court's pre-*Smith* ap-

216. Yang, 750 F. Supp. at 559.

217. See Thomas Zambito, 'A Violation, A Desecration'—Mother Sues Coroner Over Son's Autopsy, BERGEN RECORD, Oct. 3, 1995, at 3.

218. See Laura LaFay, *Inmates Must Prove Beliefs for Meals; Requests for Jewish, Nation of Islam Meals Have Risen Greatly in Prisons*, VIRGINIA PILOT, Mar. 31, 1996, at B1 (noting that in Virginia, kosher and Nation of Islam meals are served at only one prison, the Buckingham correctional facility in Dillwyn).

219. See *supra* Part IIC.

220. See, e.g., *Printz v. United States*, 117 S. Ct. 2365 (1997); *Lewis v. Casey*, 116 S. Ct. 2174, 2196 (1996); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989).

221. *Bridges: A Liberal/Conservative Dialogue with Larry Josephson* (NPR radio broadcast, Aug. 2, 1996) (transcript on file with the *Fordham Urban Law Journal*).

proach to the Free Exercise Clause, and therefore affords further support for overturning *Smith*:

I shall not restate what has been said in other opinions, which have demonstrated that *Smith* is gravely at odds with our earlier free exercise precedents. . . . Rather, I examine here the early American tradition of religious free exercise to gain insight into the original understanding of the Free Exercise Clause—an inquiry the Court in *Smith* did not undertake. . . .

The historical evidence casts doubt on the Court's current interpretation of the Free Exercise Clause. The record instead reveals that its drafters and ratifiers more likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion, a position consistent with our pre-*Smith* jurisprudence.²²²

Likewise, Justice Souter's dissent in the same case stressed that his previously explained "serious doubts about the precedential value of the *Smith* rule"²²³ had been "intensified . . . by the historical arguments going to the original understanding of the Free Exercise Clause presented in Justice O'Connor's opinion, . . . which raises very substantial issues about the soundness of the *Smith* rule."²²⁴

To be sure, in the *Boerne* case, Justice Scalia wrote a separate concurring opinion (in which Justice Stevens joined), "to respond briefly to the claim of Justice O'Connor's dissent that historical materials support a result contrary to the one reached in" *Smith*.²²⁵ As Justice Scalia's own language indicates, though, his discussion in *Boerne* is only a "brief" one. Therefore, the fact remains—as stressed in Justice Souter's dissent in *Boerne*—that the Court still has never had briefing or oral argument on any aspect of the *Smith* rule, including its (non)fidelity to the original understanding of the Free Exercise Clause; accordingly, it also remains the case that the Court has never comprehensively addressed those issues.²²⁶

V. Conclusion

I would like to close now by quoting from the Foreword to the Anti-Defamation League's book about the extreme Right, which I

222. *Boerne*, 117 S. Ct. at 2178 (O'Connor, J., dissenting).

223. *Id.* at 2185 (Souter, J., dissenting), (citing *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 564-77 (1993) (Souter, J., concurring in part and concurring in judgment)).

224. *Id.*

225. *Id.* at 2172 (Scalia, J., concurring)

226. *Id.* at 2185 (Souter, J., dissenting)

mentioned earlier. This Foreword, written by ADL's National Director, Abraham H. Foxman, is an eloquent reminder that strictly enforcing *both* First Amendment religion clauses is as essential for preserving religious liberty as it is for preserving a tolerant, pluralistic, democratic society. He wrote:

Religious righters seem unable to understand—and the pluralists among us need to continue to make the case—that in America tolerance and pluralism are traditional values, however imperfectly realized, and that they are precisely the values that bolster religion

Thanks to the Constitution's First Amendment, the sanctity of personal faith and the determination to achieve a better world—a determination that often arises from faith—have been protected throughout American history. That protection is one of the glories of the nation's heritage—a great traditional value. How ironic and unfortunate that it is now assaulted in the name of religion and traditional morality. The Anti-Defamation League, with this report, aims to help ensure that in the face of such an assault, all those who choose may honor, by the lights of their own faith . . . the prophet Micah's declaration: "And what does the Lord require of you? To act justly and to love mercy and to walk humbly with your God."²²⁷

227. Abraham H. Foxman, *foreword to* CANTOR, *supra* note 17, at iv (quoting Micah 6:8 (New King James)).